Inova Health System *and* The Nurses Association for Patient Safety *and* Cathy Gamble. Cases 05–CA–035104 and 05–CA–035331

June 30, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On August 18, 2010, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided, for the reasons stated below, to affirm the judge's rulings, findings,[2] and conclusions, as modified; to amend the remedy;[3] and to adopt the recommended Order as modified and set forth in full below.[4]

This case centers on allegations that the Respondent engaged in unlawful conduct directed at certain unrepresented nurses who worked in the ambulatory surgical center (ASC) at the Respondent's hospital in Fairfax, Virginia. As discussed below, we find that the Respondent violated the Act by (1) suspending and terminating employee Donna Miller, (2) telling Miller she could not discuss her discipline, (3) issuing a warning to employee Judy Giordano, and (4) failing to promote employee Cathy Gamble.

I. THE SUSPENSION AND TERMINATION OF DONNA MILLER

A. Relevant Facts

1. Background

In October 1986, the Respondent hired registered nurse Donna Miller and assigned her to the main operating room (Main OR), where she worked as a staff nurse, an assistant patient care director, and a patient care director. In 2002, Miller transferred to the ASC, where she worked as the senior nurse specialist (SNS) for pediatrics. ASC nurses assist surgeons in the performance of outpatient surgeries, which are divided into service lines, e.g., pediatrics, urology, and plastic surgery.[5]

The record establishes that forthright discussion, the use of profanity, and the telling of off-color jokes and stories were commonplace in the ASC, and that both nurses and surgeons engaged in such behavior. This culture was not limited to spoken words: the record includes materials that hung on the walls of the ASC operating room, including a monthly calendar depicting a cartoon penis and posters made by a pediatric surgeon that digitally superimposed a nurse's face onto provocative magazine covers. That surgeon described the jokes in the ASC as ranging "from really corny fifth grade jokes to really bad, filthy, off-color, dirty jokes." As an example of the "fifth grade jokes" that occurred, the record shows that one anesthesiologist in the ASC would shoot rubber bands at colleagues, hit the back of their

[1] We deny the Respondent's request for oral argument, as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, the Respondent's exceptions suggest that the judge's rulings, findings, and conclusions should be rejected because the judge demonstrated bias and prejudice. Having considered the entire record, we are satisfied that the contention is without merit.

In adopting the judge's factual findings and ultimate conclusions, we do not rely on his numerous inferences, including, but not limited to, the adverse inferences he drew based on the Respondent's failure to call certain management officials as witnesses. Accordingly, we find it unnecessary to address the Respondent's argument that the judge based his conclusion that the Respondent violated Sec. 8(a)(1) by suspending and discharging Donna Miller on a "cascade of inferences that have no evidentiary or logical foundation."

[3] First, in accordance with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), we shall modify the judge's remedy by requiring that any monetary awards shall be paid with interest compounded on a daily basis. Second, the judge improperly provided that the make-whole remedy for both Donna Miller and Cathy Gamble shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950). The judge cited the correct formula to calculate Miller's backpay, but Gamble did not suffer cessation of her employment. Accordingly, the correct computation method for Gamble is set forth in *Ogle Protection Service, Inc.*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, supra. Finally, we shall order the Respondent to compensate Miller and Gamble for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

[4] We shall modify the judge's conclusions of law and substitute a new Order and notice to conform to the violations found and in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014). We shall also modify the judge's recommended Order to provide for the posting of the notice in accordance with *J. Picini Flooring*, 356 NLRB No. 9 (2010).

[5] The ASC nurses are members of the Nurses Association for Patient Safety (NAPS). No party excepts to the judge's finding that NAPS is not a labor organization as defined by the Act.

knees to make them fall over, and tape signs to their backs stating things like "kick me," "kiss me," and "I'm stupid."

On April 12, 2005, Miller's supervisor decided to proceed with a scheduled pediatric surgery in the ASC after 6 p.m. Miller and other ASC nurses were upset by that decision, as it was a departure from the Respondent's practice, which had been to schedule after-hours operations in the Main OR. The following day, Miller confronted Judy Rumensky, the senior director for clinical services, over Rumensky's decision to switch another after-hours surgery from the Main OR to the ASC.

On April 15, 2005, the Respondent issued Miller a "decision making" disciplinary notice for insubordination related to her confrontation with Rumensky. The decision-making discipline—a step more serious than a written warning, but less serious than a suspension—criticized Miller for alleged insubordination and for having discussed "these incidents . . . openly with other staff, which leads to distrust of management and low staff morale."

The Respondent's rescheduling of surgeries from the Main OR to the ASC continued to cause friction between the ASC nurses and management. The friction escalated in early 2007, when the Respondent permanently moved most pediatric surgeries—including, for the first time, inpatient procedures—from the Main OR to the ASC. The nurses, particularly those who had worked in the ASC for some time and were used to more regular workdays, were unhappy with the resulting changes to their work schedules.

Beginning in October 2007, the Respondent assigned Miller to work exclusively in ASC Room 10 as the circulating nurse in pediatric surgery. Miller worked primarily with three pediatric surgeons and, by all accounts, she performed her duties well. Paula Graling, the patient care director and head of the ASC, called Miller an "excellent clinician" and a "fabulous nurse." In Miller's September 18, 2008 annual evaluation, Graling wrote that Miller was "a tremendous asset to the ASC as an experienced clinician delivering care to patients and as a unit leader." In that evaluation, Graling rated Miller higher than any of her counterparts.

Also in 2008, the Respondent formed an ASC scheduling committee consisting of Miller and three other nonmanagerial employees. The committee's role was entirely administrative: its members received training using scheduling software and entering management-approved scheduling information into a computer. Only supervisors and managers had authority to schedule employees or approve changes to their schedules.

On December 5, 2008, the Respondent promoted Miller to the position of Registered Nurse 3. The Respondent informed Miller of the promotion in a letter that praised her "clinical expertise and dedication."

Two and a half weeks later, on December 22, Miller spoke with Supervisor Graling about an issue related to the movement of pediatric patients after surgery. During their discussion, Graling stated that she had received a complaint about Miller's use of inappropriate language, which Graling linked to the unprofessional atmosphere in the ASC. As described in a memo written by Graling, Miller became offended and stated that "she didn't give a 'fu—' anymore because it didn't matter how much [she] did no one measured [her] by [her] performance." Graling responded that Miller was a "valued staff member who had done wonders to develop the [Respondent's] pediatric service line," adding that she "appreciated [Miller's] work, but wanted to coach her on what was being said about her behavior in hopes that she would be more cognizant if this was occurring." The Respondent did not issue Miller any discipline related to this discussion.

2. Calls to the Respondent's "compliance hotline" concerning Miller and the resulting investigation

In early 2009,[6] the Respondent's "compliance hotline" received three phone calls complaining about Miller. The callers were RN Lynda Engquist, Surgical Technician Brynn Lackey, and RN Paige Migliozzi. Migliozzi was an admitted statutory supervisor in charge of training student nurses (fellows) in the ASC.[7] The record is unclear as to which person made which call.

The first caller, on January 14, complained that Miller—as a member of the scheduling committee—"vindictive[ly]" changed the schedules of employees she did not like and gave them fewer hours of work. The caller also stated that both Miller and Miller's husband, who also worked as an ASC nurse, did not follow certain procedures, including properly counting surgical instruments after each surgery.

The second caller, on January 19, complained that Miller used profanity in the operating room, including when children were under anesthesia, and that she made other employees uncomfortable by talking about sexual situations. The caller said that employees were "terrified" that Miller would retaliate against them for reporting

[6] All subsequent dates are in 2009, unless otherwise noted.

[7] The Respondent places newly hired registered nurses, most of whom are recent graduates and lack operating room experience, in its ASC student fellow program. The fellows spend 6 months rotating through the different service lines in the ASC. During this time, each fellow works with a more senior RN, who serves as a preceptor/mentor to the fellow.

their concerns. The caller also stated that management was aware of those concerns.

The third caller, on February 10, complained that Miller was "intimidating," "bullie[d] her coworkers," "tend[ed] to throw her weight around," and "act[ed] very authoritative but [did] not have any authority." The caller also stated that Miller used profanity and sexual innuendo while conversing with coworkers and talked openly and graphically about her sexual relations with her husband. Finally, the caller complained about the length of breaks taken by Miller and her husband and accused Miller of bullying the charge nurse into changing her husband's assignments.[8]

After the Respondent received the third compliance hotline call, HR Manager Leanne Gorman began an investigation of Miller. Between February 11 and February 17, Gorman and another human resources representative interviewed about 19 employees, including the 3 individuals who had called the compliance hotline. The Respondent selected 11 of the 19 interviewees by "randomly" choosing every fifth person on the ASC's active roster; it selected the other 8 because each of them had previously complained about Miller.[9]

The Respondent asked each interviewee the same 10 questions. Most relevant here are the following questions about whether the interviewees were aware of, or had been subject to:

- violations of Inova's policy
- violations of Inova's standards of behavior
- conduct by another employee that made them uncomfortable
- unfair treatment by the scheduling committee
- retaliation or the fear of retaliation
- unethical or inappropriate behavior in the workplace.

The interviewees made a number of negative comments about Miller. The vast majority of those comments, however, were made by five of the eight interviewees who had previously complained about Miller. Conversely, of the 11 other interviewees, only 3 complained about Miller. The complaints and negative comments about Miller made by both groups largely mirrored those made in the three compliance hotline calls.

[8] The compliance hotline received a fourth call about Miller on February 27, 10 days after the Respondent placed Miller on administrative leave, but before it terminated her.

[9] One of the 19 interviewees fit into both categories.

3. Miller brings ASC nurses' concerns about the fellows program to management's attention; management responds negatively

While the investigation was pending, Miller and four other ASC nurses—Anita Holland, Martha Porta, Paula Hay, and Laila Bailey—agreed that Miller would draft a group email to supervisor Migliozzi expressing concerns over the Respondent's process for evaluating nursing fellows. All five of the nurses reviewed and signed the email, which read, in relevant part:

> We are [writing] regarding the coordination of the fellows and follow up evaluations for each service. We haven't received any packets with the objectives/evaluations for each fellow as they rotate through our service in quite a while. In order to be better prepared for a comprehensive rotation in each service, it would be helpful to know who is coming, the learning objectives and the length of the rotation. We need a tool to evaluate the fellows and a way to document their progress in a timely fashion. We have not been asked for any feedback on the fellows on their progress and we feel that is an important piece of the fellowship program that we need to pay attention to. I know in peds [pediatrics] that we need a break for a week before we have another fellow. The surgeons need it and we do too. Can you provide some assistance or guidance to us to help us with our concerns? We are committed to giving these fellows the best possible educational experience with all of our combined experience and guidance!

On February 13, Miller sent the email to Migliozzi, with a copy to Graling. Migliozzi forwarded the email to HR Manager Gorman with the following note:

> I want to send you this email I just received from Donna. I am quite furious she decided to appoint herself as spokesperson for this group. She has had a lot to say but hasn't said anything to me and been talking behind me. I am leaving now because I am quite furious, can we please talk Monday . . . .

Migliozzi also approached two of the ASC nurses who signed the email and complained that the signers were "ganging up" on her. She then asked them if Miller was the leader of their group.

Meanwhile, upon receiving Miller's email, Graling telephoned HR Manager Gorman, who assured Graling that there was nothing wrong with the email. Graling then responded to Miller and Migliozzi, with copies to the other four ASC nurses, stating in part:

> I would also like to emphasize that proactive communication which take[s] place in a collaborative problem solving forum is much more effective than a one dimensional group signed email which puts everyone on the defensive. In the future, I would hope that each of you would use the direct method of coming to me that most of you are used to for solving issues such as that [sic] demand my immediate attention.

On Monday, February 16, Gorman spoke with Migliozzi about Miller's email. Later that day, during a manager's meeting about the compliance hotline calls, Gorman discussed the email and Migliozzi's complaints about Miller with Chief of Surgery Dr. Russell Seneca. Dr. Seneca stated that although Miller's "clinical skills [were] excellent," she was "a vindictive person [who needed] to go" and that he "fully support[ed] her termination."

4. Miller meets with Graling and Gorman; the Respondent suspends and terminates Miller

The next day, February 17, Graling and Gorman summoned Miller to a meeting and informed her of the accusations against her. Miller denied all but one of the accusations: she admitted that, in January, during an operation in ASC Room 10 while the patient was unconscious, she responded to a doctor's question about what she had done on New Year's Eve by mentioning that she had been naked in a hot tub with her husband. The Respondent immediately placed Miller on administrative leave pending completion of an investigation, and directed her not to discuss her suspension or the investigation with anyone other than her husband.

After suspending Miller, the Respondent refused or ignored offers from two of its surgeons—Drs. Alexander Soutter and Allyson Askew—who worked with Miller on a daily basis and wanted to provide statements on her behalf. Dr. Soutter initiated a conversation with Gorman to discuss Miller and offered to be interviewed as part of the investigation. When Gorman refused his offer, Dr. Soutter left a voice mail for a supervisor in human resources. He also offered to give his version of events to the Respondent's General Counsel, but he never heard back from the General Counsel or from any supervisor or manager regarding Miller. Dr. Askew initiated a meeting with Eileen Dobbing, the senior director of perioperative services, to express her support for Miller. When Dr. Askew asked for an explanation for Miller's suspension, however, Dobbing refused to discuss the issue.[10]

Subsequently, Gorman and her supervisor, Julie Reitman, discussed Miller with the Respondent's in-house counsel. Reitman then drafted a memo recommending that Miller either be terminated or given a final written warning and transferred to another facility.

On February 25, Graling and Dobbing met with Gorman, Reitman, and Chief Nursing Executive Patricia Conway-Morana about resolving the matter. They discussed what they referred to as Miller's "intimidating behavior." Dobbing asked Conway-Morana to consider transferring Miller to another facility instead of terminating her.

Later that day, Conway-Morana sent an email to Dr. Reuven Pasternak, the Respondent's CEO, and other managers regarding the appropriate discipline for Miller. Among other things, the email cited the "decision-making" disciplinary warning that the Respondent gave Miller in 2005 for complaining about and discussing with other employees the transfer of surgeries from the Main OR to the ASC. Conway-Morana's email also stated that Dobbing "want[ed] to salvage an OR nurse" by transferring Miller to another facility, but added, "[p]ersonally, I think she should be terminated."

On February 26, Dr. Pasternak emailed Dr. Patrick Christiansen, the Respondent's administrator, and instructed him to terminate Miller. There is no evidence that Dr. Pasternak had ever been involved in any prior decision to terminate a nonmanagerial employee. On March 3, Graling informed Miller that she was terminated for creating a hostile work environment, excessive sharing of details of her personal life, and using inappropriate language.

B. Discussion

We affirm the judge's finding that the Respondent violated Section 8(a)(1) by suspending and terminating Miller in response to protected activity.

To establish a Section 8(a)(1) violation based on an adverse employment action where the motive for the action is disputed, the General Counsel has the initial burden of showing that protected activity was a motivating factor for the action. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The General Counsel satisfies that burden by proving the existence of protected activity, the employer's knowledge of the activity, and animus against the activity. See *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004). If the General Counsel meets his burden, the burden "shift[s] to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." Id. (quoting *Wright Line*) (other internal citations omitted).

[10] The Respondent contends that it did not interview Drs. Soutter and Askew because they (and all surgeons working at the Respondent's hospitals) are contractors, not employees.

Initially, we find that the General Counsel has established that Miller engaged in protected activity and that the Respondent had knowledge of that activity.

In 2009, Miller engaged in protected activity when she emailed Migliozzi and Graling to initiate a discussion about how certain aspects of the Respondent's fellows program affected ASC nurses. Miller sent the email on behalf of herself and four other ASC nurses after they all agreed that Miller would be the spokesperson on the issue, and each one signed it. As the judge pointed out, the portion of the email that asks for a week's hiatus between the assignment of fellows to the various service lines was particularly relevant to the terms and conditions of employment of the ASC nurses. See *Champion Home Builders Co.*, 343 NLRB 671, 671 fn. 3 & 680 (2004), enf. in pertinent part sub nom. *Carpenters Local 1109 v. NLRB*, 209 Fed.Appx. 692 (9th Cir. 2006) (employee who, with the support of coworkers, wrote a "protest letter" raising concerns about working conditions was engaged in protected, concerted activity). The record further establishes that the Respondent's high-level managers, including HR Manager Gorman and Chief of Surgery Dr. Seneca, were aware of the concerted nature of Miller's conduct when they shared and discussed Miller's email.

The General Counsel also established that the Respondent demonstrated animus toward Miller's protected activity. Immediately after receiving Miller's February 13, 2009 group email regarding the fellows program—which clearly was protected activity—Migliozzi forwarded the email to Gorman with a cover note stating that she was "quite furious" with Miller for "appoint[ing] herself as spokesperson for this group." Graling, Migliozzi's supervisor, then emailed Miller and made clear that the Respondent was not happy with her for attempting to resolve an issue through a "one dimensional group signed email which puts everyone on the defensive." The timing of Miller's suspension, the day after Migliozzi spoke to Gorman about the email, strongly suggests that animus toward the email played a role in the decision. Indeed, that same day, when he was informed about Miller's email, Chief of Surgery Dr. Seneca stated that Miller needed to go and that he fully supported her termination.

We also find that Miller engaged in protected concerted activity in 2005, and that the Respondent exhibited animus towards Miller based on its opposition to that activity and relied on it, in part, in its determination to discharge her in 2009.[11] In 2005, Miller confronted a manager with her concerns over the transfer of surgeries from the Main OR to the ASC, which effectively extended into the evening the ASC nurses' work schedules. Miller's concern, which was important to other ASC nurses as well, related directly to the nurses' terms and conditions of employment. Thus, in advancing her concern, Miller was engaged in protected concerted activity. See, e.g., *Unite Here Local 26*, 344 NLRB 567, 572 (2005), enfd. 446 F.3d 200 (1st Cir. 2006). And the Respondent was clearly aware of this conduct: it disciplined Miller for it. The 2005 disciplinary warning went even further, however, admonishing Miller for discussing the issue "openly with staff, which [led] to distrust of management and low staff morale." Miller's discussions with other employees about the scheduling issues constituted protected concerted activity.

Based on the foregoing considerations, we find that the General Counsel has amply met his initial burden under *Wright Line* to establish that Miller's protected activity was a motivating factor in the Respondent's decision to suspend and then discharge her.

We further find that the Respondent has not met its rebuttal burden under *Wright Line* to show that it would have suspended and terminated Miller even in the absence of her protected activity. Relying on *DTR Industries, Inc.*, 350 NLRB 1132, 1135–1136 (2007), enfd. 297 Fed.Appx. 487 (6th Cir. 2008), the Respondent argues that it had a reasonable belief that Miller engaged in unprotected misconduct—based on the "numerous complaints [it received] from employees about her disruptive, rude, belittling, and unprofessional conduct"—and that her misconduct was the "sole basis" for her discharge. The Respondent also argues that the timing of the complaints to the compliance hotline provides a legitimate explanation why it did not discipline Miller sooner.

But even if the Respondent had such a reasonable belief about Miller, we find that it has not shown that it would have suspended and discharged her in the absence of her protected activity.

To begin, the Respondent's managers' email exchanges and discussions, discussed above, revealed that they were hostile to Miller's protected activity of sending the February 13, 2009 group email.[12] As explained above,

[11] Member Miscimarra agrees that the Respondent's suspension and employment termination of Miller violated the Act, but he does not rely on the "decision-making" discipline issued by the Respondent to Miller in 2005, which was remote in time from the subsequent events, and the evidence does not establish or reasonably suggest that Miller's conduct in 2005 was a motivating factor in the Respondent's decision to terminate her employment. Accordingly, Member Miscimarra does not reach whether Miller's 2005 confrontation with management constituted concerted activity.

[12] Respondent also expressly cited Miller's 2005 discipline as one of the reasons for her discharge. This fact alone rebuts the Respondent's

Migliozzi was "quite furious" with Miller for complaining about how the fellows program affected the ASC nurses, and Graling, Migliozzi's supervisor, chided Miller for sending a "one dimensional group signed email which puts everyone on the defensive." In view of this evidence, the record does not support finding that Respondent satisfied its defense burden. See, e.g., *Bally's Atlantic City*, 355 NLRB 1319, 1321 (2010) (when there is a strong showing of unlawful motivation, the respondent's defense burden is substantial).

For example, inappropriate language—one type of alleged misconduct cited by the Respondent to explain Miller's discharge—was part of the culture of the Respondent's operating rooms. The record shows that the Respondent tolerated similar behavior by others; indeed, for years before Miller engaged in protected activity, it had tolerated the same behavior by Miller herself. Notwithstanding that behavior, the Respondent not only continued to employ Miller, it praised her work in glowing terms and, in 2008, rated her more highly than any of her counterparts and promoted her to Registered Nurse 3.

Miller's discipline (termination) was also more severe than that of another employee who showed sexually explicit photographs of herself to colleagues in 2007. That employee, a surgical technician, was not discharged for her conduct, but received a final written warning—even though, unlike Miller, she had already received two warnings in the preceding 3 months.[13]

Furthermore, the sequence of relevant events defeats the Respondent's attempt to establish its affirmative defense under *Wright Line*. To be sure, the Respondent began its investigation of Miller on February 11, 2 days before Miller sent the email in question. However, on February 16—before the investigation was completed—Gorman spoke with Migliozzi about Miller's email. The same day, Gorman discussed Miller's email and Migliozzi's complaints about Miller[14] with Chief of Surgery Dr. Seneca, who stated that Miller's "clinical skills are excellent," but that she "is a vindictive person and needs to go" and that he "fully supported her termination." The next day, Miller was suspended. Given this sequence of events, during which animus against Miller's protected concerted email was injected into the decisional process before the investigation triggered by the hotline calls had been completed, it is impossible to separate the role played by the Respondent's investigation findings from that played by its animus against Miller's email. Accordingly, the evidence does not establish that the Respondent would have suspended and discharged Miller based solely on its investigation findings even in the absence of Miller's protected concerted activity.

Finally, there is no merit in the Respondent's argument, relying on *Corrections Corp. of America*,[15] that the timing of the complaints to its compliance hotline provides a legitimate explanation why it did not discipline Miller earlier. In *Corrections Corp.*, the Board found that even though the employer may have tolerated an employee's behavior in the past, it could no longer do so after it became apparent that the behavior interfered with the employer's ability to retain RNs and provide patient care. Here, by contrast, the evidence does not show that the Respondent could no longer tolerate Miller's use of inappropriate language or that her behavior interfered with the Respondent's primary mission of patient care. There is no evidence that the Respondent took any measures to address similar behavior by the doctors in its operating rooms. And, with regard to patient care, we reiterate that just the year before discharging her, Graling gave Miller the highest ASC nurse performance rating and promoted her, and two surgeons with whom Miller worked most closely considered her an "excellent" nurse and vigorously opposed her termination.

For these reasons, we find that the Respondent has not proved that it would have suspended and discharged Miller in the absence of her protected activity. Accordingly, we affirm the judge's finding that her suspension and discharge violated Section 8(a)(1).

II. RESPONDENT'S INSTRUCTION THAT MILLER NOT DISCUSS HER SUSPENSION WITH OTHERS

We also affirm the judge's finding that the Respondent violated Section 8(a)(1) by directing Miller not to discuss her suspension with anyone except her husband. The Respondent argues that the judge erred in finding this violation because Gorman's statement was merely a "recommendation." Without citing any cases, the Respondent asserts that such an "oblique" statement "certainly does not rise to the level that it impinges on an employee's Section 7 rights."

It is well established that employees have a Section 7 right to discuss discipline or disciplinary investigations

assertion that Miller's alleged unprotected misconduct, brought to its attention via the hotline, was the "sole basis" for the decision.

[13] The Respondent also gave a final warning to ASC nurse Judy Giordano, whom, as discussed below, it accused of touching a coworker in "an aggressive manner."

[14] Recall that Migliozzi's immediate response to Miller's email was to express fury specifically at the concertedness of Miller's conduct: "I am quite furious," she told HR Manager Gorman, "she decided to appoint herself as spokesperson for this group."

[15] 354 NLRB No. 105, slip op. at 5 (2009), reaffirmed and incorporated by reference in 355 NLRB 588 (2010), affd. 421 Fed.Appx. 342 (5th Cir. 2011).

with fellow employees. See *Westside Community Mental Health Center*, 327 NLRB 661, 666 (1999). The Board has recognized that, in certain circumstances, an employer may demonstrate that a confidentiality rule is based on a "substantial and legitimate business justification" that "outweighs the rule's infringement on employees' rights." *Caesar's Palace,* 336 NLRB 271, 272 (2001).[16] But the Respondent has failed to do so here. In particular, it has not shown that confidentiality was required to protect the safety of witnesses, the maintenance of evidence, or the veracity of testimony. See *Hyundai America Shipping Agency*, 357 NLRB No. 80, slip op. at 15 (2011) (finding the employer failed to establish a sufficient justification for its confidentiality rule); accord: *Phoenix Transit System*, 337 NLRB 510, 510 (2002), enfd. 63 Fed.Appx. 524 (D.C. Cir. 2003). Accordingly, we find that the Respondent's instruction to Miller to keep the investigation and her suspension confidential violated the Act.

III. THE MARCH 24 WARNING ISSUED TO JUDY GIORDANO

On March 18, 2009, while Miller met with Administrator Dr. Christiansen to appeal her termination, a group of six or seven ASC nurses, including Judy Giordano, went to the Respondent's human resources office to show their support for Miller. After being told that they could not wait for Miller in the waiting area, the nurses left the human resources suite. They encountered Miller and Michelle Melito, a human resources representative, in a hallway, and they expressed their support for Miller. A surveillance video of the encounter (with no audio) shows that Melito spoke with the nurses; at one point, Melito turned in the direction of a group of nurses that included Giordano. Approximately 1 minute later, Melito turned and walked away from the group.

On March 24, the Respondent presented Giordano with a final written warning based on the encounter with Melito. The warning, which is the last step in Respondent's progressive discipline policy, stated: "inappropriate physical and verbal behavior, such as these behaviors exhibited in the workplace, is unacceptable and falls outside the Inova Standards of Behavior."[17]

The warning also mentioned an earlier incident, in 2008, when Giordano allegedly raised her voice at a manager during a staff meeting. At that meeting, Giordano and other ASC nurses complained that the Respondent was giving higher pay to new nurses than to more senior nurses. Although the March 24 written warning mentioned that the Respondent had "verbally coached" Giordano for insubordination for the 2008 incident, in fact the Respondent had never disciplined or verbally warned her for that incident.

For the reasons set forth in the judge's decision, we affirm his finding that the Respondent violated Section 8(a)(1) by suspending and then giving a final written warning to Giordano. The Respondent does not dispute the judge's finding that Giordano engaged in protected concerted activity when she joined other nurses in a group demonstration of support for Miller. It argues, however, that the judge erred in finding this violation because Giordano lost the protection of the Act by "plac[ing] her hand in an aggressive manner on Melito's shoulder."[18]

We find no merit in the Respondent's assertion that Giordano touched Melito in an aggressive manner. The judge found that the evidence was inconclusive as to whether Giordano actually touched Melito at all, and the judge's credibility resolutions and the surveillance video of the incident support that finding. Further, we agree with the judge that, even assuming Giordano did place her hand on Melito's shoulder, the evidence does not support a finding that she did so in an aggressive manner.

In light of the judge's findings, we are satisfied that Giordano's conduct, if misconduct at all, was not so opprobrious as to lose Giordano the protection of the Act. See *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). Accordingly, we adopt the judge's finding that the Respondent violated the Act by issuing the March 24 warning to Giordano.

---

[16] We recognize that the Respondent's instruction to Miller not to discuss her suspension does not constitute a confidentiality "rule." Instructions directed solely at one employee that "were never repeated to any other employee as a general requirement" are not work rules. *Flamingo Las Vegas Operating Co.*, 360 NLRB No. 41, slip op. at 1 & fn. 5 (2014); see also *Teachers AFT New Mexico*, 360 NLRB No. 59, slip op at 1 fn. 3 (2014) (no evidence the employer's statements were communicated to other employees or would be reasonably construed as establishing a new rule or policy). Nonetheless, the same balancing of employer business justification against employee rights in evaluating the lawfulness of a confidentiality rule likewise applies to determine whether a confidentiality instruction issued to a single employee violates the Act. See *Intermet Stevensville*, 350 NLRB 1349, 1355 (2007) (citing *Caesar's Palace*, supra).

[17] The record contains an earlier draft of the March 24 warning given to Giordano. That draft included the following additional language:

> From reviewing the surveillance video, it is apparent that you did touch the left should[er] of the HR Rep. This touch was not done in an aggressive manner[;] however, unwanted physical contact is unprofessional.

The Respondent offered no explanation why it removed that language from the version of the warning ultimately given to Giordano.

[18] The Respondent also asserts that if it truly had any retaliatory motive against Giordano, it "certainly would have seized on the opportunity to terminate [her]."

IV. THE FAILURE TO PROMOTE CATHY GAMBLE

In February 2009, the Respondent created a new position in the ASC called clinical nurse leader (CNL) and encouraged the senior nurse specialists to apply. The CNLs would work in specific service lines, of which there were seven or eight (e.g., orthopedics, urology, plastic surgery), and earn one dollar an hour more than the SNSs. Five nurses—including three SNSs and two RNs—applied for the CNL positions. One of the applicants was SNS Gamble.

At a staff meeting on June 2, when the CNLs had not yet been selected, Graling thanked ASC Nurse Guna Perry for volunteering to stay late the previous evening to assist with a surgery that had been transferred from the Main OR to the ASC. Afterwards, Gamble and Nurse Margaret Donegan told Perry that she should not have volunteered to stay late because it created a bad precedent and that management would come to expect ASC nurses to stay late to assist in surgeries scheduled for the Main OR. Upset by this exchange, Perry told Graling and ASC Management Coordinator Mary Lou Sanata about what Gamble and Donegan had said to her and stated that she did not want the nurses' working conditions to change because of her decision to stay late.

In August or early September, after completing the interviews for the new CNL positions, the Respondent determined that it would only hire four CNLs. The Respondent then created a spreadsheet, which it called a "matrix," to compare the five candidates. Among other things, the matrix states that Gamble was "prone to gossip."

The Respondent selected RN Deeb Oweis for the CNL position in "general surgery and urology," the service line that would have been most appropriate for Gamble. The Respondent admits that Gamble is a good nurse and was qualified for the CNL position, but contends that Oweis was better qualified.

On September 8, Sanata notified Gamble that she had not been chosen for a CNL position. Sanata told Gamble that one of the reasons that she did not get the promotion was her comment to Perry after the June 2 staff meeting.

We affirm the judge's finding that the Respondent violated Section 8(a)(1) by failing to promote Gamble to the CNL position. Specifically, we find that the General Counsel met his initial *Wright Line* burden to show that Gamble's protected activity was a motivating factor in the Respondent's decision, and that the Respondent's stated reasons for failing to promote Gamble are largely unsupported by the record and, in one instance, simply untrue.

As an initial matter, we find that Gamble was a qualified applicant for the position of CNL. At the time of her application, Gamble had 29 years of continuous nursing experience—20 in the operating room and 9 in critical care units—and was the SNS (clinical expert) for the vascular and general surgery service lines. Moreover, Gamble's annual evaluations show that the Respondent considered her to be an excellent nurse with superior clinical skills. Conversely, Oweis had significant gaps in his nursing career—from 1983 to 1989, and again from 1996 to 2007. And immediately prior to becoming a manager, Oweis had worked only 16 months as a nurse. The Respondent attempted to compensate for Oweis' more limited experience by erroneously asserting that his level of education was superior to Gamble's.[19]

We further find that Gamble was engaged in protected concerted activity when, after the June 2 staff meeting, she and Donegan told Perry that Perry should not have volunteered to stay late the previous evening. Gamble and Donegan made their comments because they believed that Perry's action would encourage the Respondent to shift more operations from the Main OR to the ASC, a practice that, as discussed above, had upset many of the ASC nurses because it would alter their schedules and effectively increase their work hours.

The Respondent does not dispute that Gamble's comments to Perry—attempting to dissuade her from volunteering for the transferred after-hours surgery—were a factor in its decision not to select her for a CNL position. Instead, citing *Audubon Health Care Center*, 268 NLRB 135, 136 (1983), it argues that Gamble's comments were unprotected because they advocated a partial strike. This argument lacks merit because the record and the judge's credibility determinations show that ASC nurses who stayed late to work on new surgeries volunteered to do so. "The Board has long held that a refusal to perform voluntary work does not constitute an unprotected partial strike." *St. Barnabas Hospital*, 334 NLRB 1000, 1000 (2001), enfd. 46 Fed.Appx. 32 (2d Cir. 2002). Thus, it is not unprotected conduct for one employee to discourage another from accepting voluntary work, particularly where, as here, the first employee has a reasonable belief that acceptance of voluntary work will affect the terms and conditions of other employees.

We also find that the Respondent was aware of Gamble's protected activity. The Respondent's knowledge is

[19] We address Oweis' qualifications only as additional support for our finding that the evidence contradicts most of the Respondent's stated reasons for choosing Oweis over Gamble, not to determine that one was better qualified than the other. Such a comparison is not necessary to the finding of a violation.

established by Graling's observation of Gamble's and Donegan's conversation with Perry, and by Perry's subsequent report of that incident to two high-level management representatives, Graling and Sanata.

Finally, we find that the Respondent showed animus toward Gamble's protected activity. That animus is established by Sanata's testimony that Gamble's discussion with Perry was a factor in the decision not to promote her.

In light of the foregoing considerations, we find that the General Counsel has met his initial burden under *Wright Line* by showing that Gamble's protected activity was a motivating factor in the Respondent's failure to promote her.

The Respondent contends that even assuming that the General Counsel made out a prima facie case under *Wright Line*, the facts show that it would have made the same decision—selecting Oweis instead of Gamble for promotion—even in the absence of Gamble's protected activity. Specifically, the Respondent asserts the following reasons for not choosing Gamble: (1) her inability to scrub and circulate, and therefore her inability to "precept"—i.e., train—others in those roles; (2) questions regarding her performance (calling her "a middle to low performer"); (3) her decision to work on administrative matters on one occasion when the surgical unit was busy; (4) her failure to "climb the clinical ladder" of professional development; (5) her lack of accountability as shown by the poor upkeep of vascular carts; and (6) her comment, during her interview, that her approach to problem solving was to "growl back" at physicians who were being difficult. In addition, as stated above, the matrix the Respondent relied on to compare the candidates for promotion criticized Gamble as "prone to gossip."

The record establishes that, contrary to the Respondent's assertions, several of its stated reasons for preferring Oweis to Gamble are unsupported by the record and, in one instance, simply untrue.

First, the untrue stated reason for not promoting Gamble relates to Respondent's assertion that she was "prone to gossip." The Respondent's Management Coordinator Sanata admitted at the hearing that this explanation was not true.

Second, the record does not support the Respondent's assertion that it failed to promote Gamble, in part, because she stayed late to address administrative matters on one occasion instead of working in the unit when it was busy.[20] Sanata acknowledged that she did not know that Gamble was available to work in the unit that day, and the judge credited Gamble's testimony that she would have helped out in the unit if anyone had asked her to do so. The posthoc nature of the Respondent's focus on this incident is highlighted by the fact that, merely a week later, Sanata gave Gamble a thank you card from the ASC management team commending Gamble for her "hard work and dedication."

Third, the record does not support the Respondent's ostensible reliance on Gamble's purported inability to precept in the scrub or circulating roles. According to Paula Hay, one of the four nurses selected for promotion to CNL whose testimony the judge fully credited, CNLs do not precept in either the scrub or circulating positions; rather, the senior nurse or scrub technician of the service line serves as the preceptor.

Fourth, the Respondent's claim that Gamble was responsible for outdated items on the vascular cart was disproved at the hearing. Sanata testified that no one individual was individually responsible for the vascular cart's upkeep, but rather that "one, two, or four people could constantly on a daily basis make sure everything wasn't expired."

Finally, the Respondent's claim that Gamble was a "middle to low performer" is contradicted by her annual evaluations, which, as stated above, show that the Respondent considered her to be an excellent nurse with superior clinical skills.

Even assuming Gamble failed to "climb the clinical ladder" of professional development and gave a less than satisfactory answer to a question concerning her approach to problem solving, we have rejected the Respondent's other asserted reasons for Gamble's nonselection, and the Respondent does not contend that it would have denied Gamble the promotion for these two reasons alone.

For the above reasons, we conclude that the Respondent has not met its burden to show that it would have denied Gamble the promotion to the position of CNL in the absence of her protected activity. Accordingly, we affirm the judge's finding that the Respondent's failure to promote her violated Section 8(a)(1).

AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge's Conclusion of Law 1.

[20] Gamble worked a half-day every other week, with her shift ending in the early afternoon. Sanata testified that this event occurred on one of Gamble's short days.

"1. Respondent violated Section 8(a)(1) of the Act by suspending Donna Miller in February 2009 and then terminating her in March 2009."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Inova Health System, Fairfax County, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending, discharging, disciplining, denying promotions to, or otherwise discriminating against employees for engaging in protected concerted activity.

(b) Prohibiting employees from discussing with other employees any discipline issued to them or any matters under investigation by its human resources department absent a substantial and legitimate business justification for doing so.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Donna Miller full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Within 14 days from the date of this Order, offer Cathy Gamble the position of Clinical Nurse Leader.

(c) Make Donna Miller and Cathy Gamble whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(d) Reimburse Miller and Gamble an amount, if any, equal to the difference in taxes owed upon receipt of a lump-sum backpay payment and taxes that would have been owed had there been no discrimination against them.

(e) Submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Miller and Gamble, it will be allocated to the appropriate calendar quarters.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discharge of Donna Miller, the unlawful discipline of Judy Giordano, and the unlawful failure to promote Cathy Gamble, and, within 3 days thereafter, notify them in writing that this has been done and that the unlawful discrimination will not be used against them in any way.

(g) Preserve and, within 14 days of request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility in Fairfax County, Virginia, copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at its Fairfax County facility at any time since February 17, 2009.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 30, 2014

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT suspend, discharge, discipline, deny promotions to, or otherwise discriminate against any of you for engaging in protected concerted activity.

WE WILL NOT prohibit you from discussing with other employees any discipline issued to you or any matters under investigation by our human resources department unless we have a substantial and legitimate reason for doing so.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Donna Miller full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, offer Cathy Gamble the position of Clinical Nurse Leader.

WE WILL make Donna Miller whole for any loss of earnings and other benefits suffered as a result of her unlawful suspension and discharge, less any net interim earnings, plus interest.

WE WILL make Cathy Gamble whole for any loss of earnings and other benefits suffered as a result of our unlawful failure to promote her, plus interest.

WE WILL reimburse employees Donna Miller and Cathy Gamble an amount, if any, equal to the difference in taxes owed upon receipt of a lump-sum backpay payment and taxes that would have been owed had there been no discrimination against them.

WE WILL submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Miller and Gamble, it will be allocated to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and discharge of Donna Miller, the unlawful discipline of Judy Giordano, and the unlawful failure to promote Cathy Gamble, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the unlawful discrimination will not be used against them in any way.

INOVA HEALTH SYSTEM

The Board's decision can be found at www.nlrb.gov/case/05-CA-035104 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

Mary Anastasia Hermosillo and *Paula Sawyer, Esqs.,* for the General Counsel.

H. Tor Christensen and *John Doran, Esqs. (Littler, Mendelson, P.C.)* of Washington, DC, and Boston, Massachusetts, for the Respondent.

Paul M. Tyler and *Brian Connolly, Esqs. (Gromfine, Taylor and Tyler, P.C.)* of Alexandria, Virginia, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Washington, DC, on 14 days between April 21, 2010, and June 18, 2010. The Nurses Association for Patient Safety (NAPS), a group of nurses working in the Ambulatory (Outpatient) Surgical Center (ASC) of Respondent's hospital in Fairfax, Virginia, filed an initial charge on July 14, 2009, by its representative, attorney Paul M. Tyler. NAPS filed an amended charge on August 25, regarding the suspension and termination of Nurse Donna Miller in February and March 2009, and a

final written warning issued to Nurse Judy Giordano[1] in March 2009. The General Counsel issued a complaint on October 30, 2009.[2]

On October 14, 2009, Cathy Gamble filed a charge concerning Respondent's failure to promote her to the position of clinical nurse leader (CNL) in the ASC. On January 15, 2010, the General Counsel issued a complaint consolidating Ms. Gamble's allegations with those of NAPS.

On the entire record,[3] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, Inova Health System is a corporation, which operates several hospitals, including the one involved in this case, Inova Fairfax Hospital in Fairfax County, Virginia. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges that Respondent violated Section 8(a)(1) of the Act:

> (a) in suspending and terminating Donna Miller because she engaged in concerted activities by sending an email to management on behalf of herself and other nurses, on February 13, 2009, four days before she was suspended (or placed on administrative leave). This email was sent approximately three weeks before Respondent terminated Miller. The General Counsel also alleges that Respondent suspended and then terminated Miller in order to discourage employees from engaging in other concerted activities;
>
> (b) in telling Ms. Miller that she could not discuss her discipline with anyone;
>
> (c) in suspending and then giving a final written warning to Judy Giordano because Giordano and other employees concertedly protested Donna Miller's discharge;
>
> (d) in failing to promote Cathy Gamble because she concertedly told another employee not to accept unscheduled late surgeries because nurses would be expected to work late.

As explained below, I find that Respondent violated the Act as alleged with regard to Ms. Giordano and Ms. Gamble and in terminating Donna Miller. I conclude that Respondent would not have terminated Ms. Miller in 2009 but for protected activity she engaged in and was disciplined for in 2005. I find that this issue was tried by the consent of the parties and that Respondent has not been prejudiced by my basing my conclusion on these facts. I also find that the General Counsel has made a prima facie case that the termination decision was related to Miller's February 13 email, and that Respondent failed to adequately rebut this prima facie case.

I also find that Respondent violated the Act in telling Donna Miller that she could not discuss her suspension with any coworkers other than her husband.

THE SUSPENSION AND TERMINATION OF DONNA MILLER

Donna Miller's Work History Prior to December 22, 2008

At the time of her termination on March 3, 2009, Donna Miller had worked at Inova Fairfax Hospital as a nurse for over 22 years. She was hired in October 1986. For many years, Miller worked in the main operating room as a staff nurse, assistant patient care director, and patient care director. In 2002, she transferred to the ASC (outpatient surgery) where the work hours were more regular and where there wasn't any weekend work, as a staff nurse.

On April 15, 2005, Miller's then supervisor in the ASC, Sherre Lopez, issued Miller a "decision-making" disciplinary notice for insubordination.[4] This notice, a step more serious than a written warning, but less serious than a suspension in Respondent's progressive disciplinary system, remained in Miller's personnel file until her discharge. It was considered by Respondent's management in deciding to terminate her employment in February and March 2009.

On April 12, 2005, Miller took issue with Lopez' decision to proceed with a scheduled operation after 6 p.m. The next day, according to Lopez, Miller became verbally abusive and disrespectful to Judy Rumensky, then Respondent's senior director for clinical services. Rumensky had decided to move a surgery from the main operating room to the ASC. Miller, according to reports received by Lopez, "yelled, repeatedly pointed her finger, made inappropriate comments about Judy's treatment of her department, and was argumentative and demanding."

Lopez then noted:

> Additionally, it has been reported to me that these incidents have been discussed openly with other staff, which leads to distrust of management and low staff morale.

GC Exh. 17, p. 30.

Rumensky's account of the April 12 incident was that Miller yelled at her "about me not doing anything for them and letting the Main get by with everything…we've stayed late 2 nights this week already . . . what was I going to do for them…this happens all the time. . . ."

---

[1] Ms. Giordano is also referred to in this record by her former name, Judy Blood.

[2] Respondent's assertion that NAPS must be a "labor organization" in order to file a valid charge is contrary to long standing Board law. There is no limitation as who or what type of entity may file a charge, *Bagley Produce, Inc.,* 208 NLRB 20, 21 (1973).

[3] Each page of every document produced by Respondent in response to the General Counsel's subpoena has a unique number in the lower right corner of each page. These are called "Bates numbers," e.g., INOVA 01471. When I cite to these numbers I will omit INOVA and the zero.

The errors in the transcript have been noted and corrected.

[4] This discipline is also referred to as a "decision-making suspension." It is unclear whether Miller missed work as a result or lost any pay.

GC Exh. 17, p. 34.

Miller appealed her decision-making suspension. She wrote to, and then met with Dr. Russell Seneca, the chairman of Inova Fairfax's Department of Surgery, on June 7, 2005. Miller wrote to Seneca that the issue about transfers from the main operating room to the ASC had continued to fester. Dr. Seneca upheld the suspension.

Id., pp. 35–43.

From October 2007 until being placed on administrative leave on February 17, 2009, Miller worked exclusively in the pediatric surgery room of the ASC, room 10. Respondent concedes that Miller performed her duties well. Miller is, according to the head of the ASC during Miller's tenure, "an excellent clinician," "a fabulous nurse." (Tr. 259, 1007, 1727.)

Respondent did not issue any written discipline to Miller between the summer of 2005 and February 2009.[5] However, the issues surrounding the 2005 discipline continued to fester between the nurses in the ASC and Respondent's management. Particularly when most pediatric surgeries were moved to the ASC in late 2007 and early 2008, the nurses in the ASC were asked to work later and later without relief from the main operating room. This became a huge issue amongst the nurses, particularly those who had been working in the ASC for several years and were accustomed to shorter hours. (Tr. 718, 1146, 1604–1606.) However, there is no evidence in this record linking this issue to the termination of Donna Miller, apart from the 2005 discipline, and no evidence that she engaged in any protected activity between 2005 until February 13, 2009, 4days before she was placed on administrative leave.

In early 2007, Eileen Dobbing became the senior director of perioperative services at Inova Fairfax in charge of all the operating rooms.[6] Shortly thereafter, Respondent started performing most types of children's surgeries, inpatient and outpatient, in Room 10 of the ASC. Previously, most children's inpatient operations had been performed in the main operating room. (Tr. 1498–1499.) Donna Miller was assigned to Room 10 as the circulating nurse in 2007, working primarily with two pediatric surgeons, Dr. Alexander "Sam" Soutter and Dr. Allyson Askew. In the spring of 2008 she also began to work with Dr. Stephen Kim.

After these pediatric cases were transferred to the ASC, the discord amongst the nurses in the ASC increased over the issue of staying late to assist in pediatric surgeries. (Tr. 1146.) It was Respondent's practice until sometime in 2009 or 2010 to perform pediatric surgeries after 6 p.m. in the main operating room. Sometime in 2009 or 2010, Respondent began to schedule pediatric surgeries in the ASC until 7:30 p.m. This was done most likely to prevent pediatric patients, who generally could not ingest anything by mouth, from having to wait any longer than necessary for their surgeries. (Tr. 1498.)

On September 18, 2008, the patient care director of the ASC, Paula Graling, Miller's immediate supervisor, gave Miller her yearly evaluation.[7] Graling wrote that, "Donna is a tremendous asset to the ASC as an experienced clinician delivering care to patients and as a unit leader." (GC Exh. 34, Bates # 00098.) In 32 categories in which Miller was rated on a scale from 1 to 5, she received a 5, "distinguished: exceeds all standards" in 24 categories. Her overall performance rating, 463 points out of a possible 500, was considerably higher than the ratings given by Graling to other nurses whose evaluations are in this record (GC Exh. 34, Bates #00097.)

Events Leading to the Termination of Donna Miller[8]

Miller was promoted to Registered Nurse 3, from Registered Nurse 2 on December 5, 2008. (GC Exh. 33.) Two and a half weeks later, on December 22, 2008, Miller went to see her immediate supervisor, Paula Graling, concerning an issue regarding the movement of children following surgery. Graling raised a complaint she had received about the language used by Miller in the ASC. According to a memo authored by Graling, but not signed nor apparently seen by Miller:[9]

> I took the opportunity to ask Donna about the climate of teamwork in room 10 and told her I had received several concerns from staff members, old and novice, about the language and unprofessional atmosphere in Room 10. She became very offended and asked why the staff did not come to her. I told her that I had referred staff members back to her but that it was exactly her challenging attitude that perhaps made it difficult for staff to confront her. She told me that they should all "fu.." off and I had ruined her day. She also told me that she didn't give a "fu.." anymore because it didn't matter how much you did no one measured you by your performance. I stated that this was not true and that she was a valued staff member who had done wonders to develop the pediatric ser-

[5] Paula Graling testified that on December 22, 2008, she gave a verbal coaching to Miller. Miller testified that while Graling advised her of complaints about her language, Graling did not tell her that their discussion constituted a coaching. I find that Miller was not disciplined.

[6] Although Dobbing is the interim senior director of perioperative services, she had held this position for 3 years at the time of the instant hearing.

[7] The chain of command relevant to this case is as follows: staff nurses reported directly to Mary Lou Sanata, a management coordinator, and Paula Graling, interim Patient Care Director. Sanata reported to Graling. Graling reported to Eileen Dobbing. Dobbing reported to Dr. Patrick Christiansen, PhD, Inova Fairfax's administrator, and also to Pat Conway-Morana, the chief nursing executive and Dr. Russell Seneca, the chief of surgery. Dr. Christiansen, Dr. Seneca, and Ms. Conway-Morana reported directly to Dr. Reuven Pasternak, the CEO of Inova Fairfax.

In Respondent's human resources department Leanne Gorman, a human resources manager, reported to another human resource manager, Julie Reitman. Julie Reitman reported to Kenneth Hull, the director of human resources. Hull reported to Dr. Christiansen.

[8] The testimony of management witnesses, Gorman, Graling, Dobbing, Drs. Christiansen, and Pasternak regarding the process by which Respondent terminated Donna Miller is generally unreliable insofar as it supports Respondent's case. This testimony is riddled with inconsistencies, clearly inaccurate statements and material gaps regarding the process by which decisions were made.

[9] The text of Graling's memo suggests that it was written after Miller left Graling's office.

> vice line. I appreciated her work, but wanted to coach her on what was being said about her behavior in hopes that she would be more cognizant if this was occurring (since I was not a direct observer). I also told her I would ask staff to confront her in person in the future if they had concerns but that I was thankful they could come to me and give us an opportunity to address the situation without escalating it out of the department. She did not seem at all soothed by my remarks and left my office angry.

GC–17, pp. 29.[10]

Graling testified that she considered this a verbal warning. However, Graling's boss, Eileen Dobbing, testified that Miller was not written up, Tr. 1505, as did HR Manager Leanne Gorman (Tr. 1721–1722.)[11] I find that Miller was not disciplined in December 2008.

Graling also testified that she called HR Manager Leanne Gorman the next day and this document went into Miller's personnel file. Eileen Dobbing testified that she directed Graling to report her meeting with Miller to HR Manager Gorman. (Tr. 1504.)[12] This procedure is inconsistent with Respondent's progressive discipline policy. That policy (GC Exh. 4, B # 1367), mandates, for example, that any "reminder" or "warning" be given to the employee to sign. This was not done with regard to Graling's notes of the December 22, 2008 meeting. A "verbal reminder" is not forwarded to the human resources department under this policy. Graling's call to HR and sending her notes to Gorman on December 22, suggests that management began to build a case against Miller beginning in December 2008.

There was no follow-up to Graling's discussion with Miller on December 22. Graling testified that she planned to meet again with Miller, but did not do so after Damika Evans, a student nurse who had complained about Miller, told her that Miller had spoken with Evans. (Tr. 248.) Eileen Dobbing, on the other hand, testified that when Graling told her that Miller wanted to speak to Damika Evans, Dobbing told Graling that would not be a good idea. (Tr. 1503.) Miller testified that she decided not to approach Evans. (Tr. 1198.) Evans testified in this proceeding and did not mention any discussion with Miller resulting from Miller's December 22 meeting with Graling. From this I conclude Miller never talked to Evans, and that Graling did not followup on Evans' complaints.

On January 14, 19, and February 10, 2009, anonymous phone calls were made to the Inova System hotline complaining about Miller. There is no evidence of any specific offensive conduct by Miller after December 22, 2008. The record establishes that Miller's conduct, including her use of profanity and discussing her sex life had been unchanged for at least several years if not longer. Thus, there is no explanation for why four calls about Miller were made to the Inova hotline within 6 weeks in January and February 2009.

At least one of these calls was apparently made by Paige Migliozzi, the nurse in charge of the training of student nurses in the ASC. In its answer to the consolidated complaint, Respondent admitted that Migliozzi was a supervisor within the meaning of Section 2(11) of the Act and its agent pursuant to Section 2(13) of the Act at all times material to this case.

Nurse Lynda Engquist and Surgical Technician Brynn Lackey made two of the other calls to the hotline about Miller. A fourth call was received on February 27, 10 days after Miller was placed on administrative leave, but before she was terminated.

The caller on January 14, complained that Miller was vindictive to employees she does not like by changing their schedules and giving them few hours of work. The record in this case establishes that Miller had no ability to change other employees' schedules or limit their hours of work, e.g. (Tr. 559–563, 1567). The caller also said that Miller and her husband [Terry Miller], who also works as a nurse in the ASC pediatric operating room, did not follow certain procedures, such as counting instruments after surgery. While Miller had a dispute with Nurse Paige Migliozzi about counting instruments, she did not violate Respondent's policies in not counting instruments for surgeries in which the surgeon did not enter the peritoneal cavity. However, this policy was changed after a discussion between Miller and Paula Graling. This first caller apparently did not complain about Miller's use of profanity and making obscene statements, an allegation that was relied on by Respondent in terminating Miller.

Five days later, on January 19, another anonymous call was made to the Inova hotline about Miller. The hotline employee taking the call recorded the complaint as follows:

> Caller stated that for "years," Donna Miller, RN, has been using profanity at work. Caller stated Ms. Miller uses profanity in the operating room while children are under anesthesia. Caller stated Ms. Miller also talks about sexual situations. Caller stated employees are uncomfortable with Ms. Miller's language and subjects of conversation. Caller stated employees are "terrified" Ms. Miller will retaliate against them for reporting these concerns. Caller was reminded of the non-retaliation policy. Caller had no additional information to provide.
>
> Caller stated management (declined to name) is aware of the concern.

[10] Graling did not testify under oath that Miller said the things Graling attributed to her in the memo. Miller denied telling Graling that her critics could f-off, etc., but it is not entirely clear that her denial goes to the December 22 meeting or a subsequent meeting with Graling. (Tr. 1201.) I'm inclined to believe that Graling's account of the December 22 meeting is fairly accurate.

[11] I discredit the testimony of Dobbing and Gorman to the extent that they suggest that Graling was instructed to discipline Miller in December. I consider Dobbing's testimony at Tr. 1505 very ambiguous on this point.

[12] Gorman testified that Graling called her first and that she advised Graling to call Dobbing. (Tr. 1720–1722.) Regardless, of which one Graling called first, her unprecedented step of escalating a nondisciplinary incident leads me to believe that the December 22, 2008 meeting was the beginning of an orchestrated campaign by Respondent regarding Miller's employment. One thing that is clear is that the initiative for this escalation did not come from Graling. Somebody higher up in Respondent's management had begun to look for a reason to build a case against Miller.

Miller used profanity, openly talked about her sex life, made off-color statements, and told off-color and possibly even obscene jokes in the workplace and in the operating room. It is unclear however, how frequently she did so. Based on the testimony of Dr. Steven Kim, who I regard as a neutral witness, it was rare that Miller said anything in the operating room that stood out in terms of its sexual or offensive nature. Dr. Kim worked with Ms. Miller at least once a week for an entire day from May 2008 until February 2009. He could only recall one comment by Miller that stood out in his mind as inappropriate and that comment was made in the early part of his association with her. (Tr. 2236–2238.)

Miller's conduct in this regard was consistent with the culture of the ASC. (GC Exh. 16, Bates #3419, Tr. 1472–1473.)[13] I find that the use of profanity and off-color and even obscene language was commonplace in the ASC. According to the uncontradicted testimony of Cathy Gamble, Dr. Russell Seneca, the chief of surgery at Inova Fairfax, "could cuss like a sailor," Tr. 670. Respondent was well aware that cursing and off-color jokes and conversation were commonplace in its operating rooms before it launched its investigation of Donna Miller, as well as during its investigation of the allegations against Miller, e.g. (Tr. 1976–1977, GC Exh. 16, B #3416).

A third hotline call was made on February 10, 2010. This caller, who I infer was Lynda Engquist, stated that Miller "is intimidating, bullies her coworkers, and tends to throw her weight around." Also the caller stated that "Miller acts very authoritative but does not have any authority." Thus, the third caller contradicted the assertions made by the first caller regarding Miller's vindictive changing of other employees' schedules.

The third caller also related that Miller frequently used profanity and sexual innuendos while conversing with coworkers. The caller related that Miller talked openly and very graphically about her sex life. The caller mentioned comments that Miller made about sexual relations with Miller's husband, Terry Miller, who worked with her as a nurse in ASC pediatric operating room.

Donna Miller denies making these graphic statements. Nevertheless, I generally credit the testimony of Lynda Engquist that she did so. The most graphic comment was overheard by Engquist in an employee lounge about 2 months prior to Miller's discharge. (Tr. 2008–2009.) However, I find that the use of profanity and sexual banter was not as limited to Donna Miller as suggested by Engquist. Rather, I find, as related to Leanne Gorman by Bobbie MacDonald (see p. 12), who apparently was not one of Miller's friends, that the language used by Miller was pervasive in the ASC and MOR and had been for many years. I also find that based on MacDonald's account that Donna Miller discussed sex more often than most nurses in the ASC, but no more than some physicians who worked in the ASC. I am also uncertain that Miller said everything attributed to her by Engquist. The two women clearly had a mutual antipathy towards each other dating back to the 1990s.

Finally, the third caller relayed comments attributed to nurse Cathy Gamble regarding Miller's plans to rearrange nurse's work schedules. The caller also complained about the length of the breaks being taken by Donna and Terry Miller and complained that Donna Miller bullied the charge nurse into changing Terry Miller's assignments. None of these accusations are supported by this record except the length of the breaks taken by the Millers.

Leanne Gorman, an Inova Fairfax human resources manager, conducted an investigation of Miller based on the compliance calls. She interviewed 8 employees on February 11, three more on February 12, and four on February 17. Vivian Stancil, another HR representative, interviewed five employees on February 12. There is no credible evidence that Respondent has conducted an investigation of this magnitude with regard to any other employee.

Four of the eight employees interviewed by Gorman on the 11th were selected randomly by choosing every fifth person on the active employee roster of the ASC; the other four were not selected randomly. The two employees interviewed by Gorman on February 12 were selected randomly. Vivian Stancil interviewed five employees on February 12, all of whom were selected randomly, except for Teresa Ford. Ford was the only employee interviewed by Stancil who provided Respondent with significant negative comments about Miller, none of which concerned profanity or sexual banter. Rita Martin, who was the 40th person on the roster, was not interviewed.

I infer that it is not coincidence that the vast majority of comments relied upon by Respondent in terminating Miller came from employees who were not selected randomly and were interviewed by Gorman, rather than by Stancil. The interview process was done precisely to build a case against Miller. The random selection was done to give the investigation the appearance of objectivity.

Paula Graling testified that after the investigation was completed, two nurses, Lynda Engquist and Bobbie MacDonald, approached her and asked if they could speak to Gorman. This is not true. Engquist and MacDonald were interviewed the first day that Gorman conducted interviews. Engquist, a witness called by Respondent, testified that she was asked to speak to Gorman; she did not volunteer. (Tr. 1983–1984, 2010.) Margaret Donegan was also interviewed on February 11 despite the fact that she was not one of the nurses selected by Gorman at random. Donegan, like Engquist, did not volunteer to be interviewed. She was told by management to talk to Gorman. (Tr. 1324.)[14]

[13] I fully credit the testimony of Paula Hay, a current employee of Respondent, including her testimony regarding the "culture of the operating room" cited above. Board law recognizes that the testimony of current employees that contradicts statements of their supervisors is likely to be particularly reliable. *Flexsteel Industries*, 316 NLRB 745 (1995), enfd. mem. 83 F.3d 419 (5th Cir. 1996). The testimony of current employees that is adverse to their employer is ". . . given at considerable risk of economic reprisal, including loss of employment . . . and for this reason not likely to be false." *Shop-Rite Supermarket*, 231 NLRB 500, 505 fn. 22 (1977).

[14] Bobbie MacDonald, Paige Migliozzi, and Teresa Ford, the other three nonrandom interviewees on February 11 and 12, 2009, did not testify in this proceeding.

Gorman testified that Paula Graling asked her to interview three of these employees and that Paige Migliozzi was interviewed because she asked Graling to speak to Gorman. Graling, on the other hand, testified that she told Migliozzi that Gorman would like to speak to her. (Tr. 2213.) The investigation was supposed to be a secret, but Gorman conceded that she didn't ask Migliozzi how she found out about it. (Tr. 1900.)

I find Gorman's testimony of how employees were selected to be incredible. Gorman interviewed eight employees of the first day of her investigation, only four of whom were selected by random. Three of the four nonrandom selections, Lynda Engquist, Paige Migliozzi, and Bobbie MacDonald provided most of the input most detrimental to Miller. I conclude this was not coincidental. If Gorman was conducting an impartial investigation I conclude she would have interviewed all the random interviewees before talking to Miller's known enemies.

Gorman testified that the interviewees were told not to talk about the interviews and that she tried to obscure the fact that the investigation was the result of complaints about the Millers. Given the fact that the nonrandom interviewees were the employees from whom the most damaging information to the Millers was elicited, I conclude that Engquist, Migliozzi, MacDonald, and Donegan were selected for interviews on the assumption that they would be most likely to provide information to build a case against Donna Miller. In fact, I find that Gorman knew or suspected before she started her interviews that Migliozzi and Engquist had made at least some of the calls to the hotline about Miller.

Gorman asked each employee 10 questions, most relevant to this case are questions about:

1. violations of Inova policy;
2. violations of Inova's standards of behavior;
3. whether the employee had been made uncomfortable by another employee;
4. unfair treatment by the ASC Scheduling Committee. Although Miller was not mentioned, she was one of four members of the scheduling committee;
5. Had the interviewee experienced retaliation by anyone or did they fear retaliation by anyone;
6. Had the interviewee experienced or witnessed unethical or inappropriate behavior in the workplace.

Of the 11 employees picked at random and interviewed, Gorman and Vivian Stancil, another HR representative, recorded complaints about Donna Miller by three of these employees; Cathy Gamble, Brynn Lackey, and Damika Evans.

The HR investigators reported that Cathy Gamble (also an alleged discriminate in this case) reported that Terry Miller, and to a lesser extent, Donna Miller, took longer breaks than they were allotted. Gamble was also reported as saying that Donna Miller intimidates the charge nurse into changing her husband's assignments. Guna Perry, a former charge nurse in the ASC, testified in this proceeding that Donna Miller asked her to change Terry Miller's schedule on one occasion and that other nurses asked her to change their assignments on a regular basis. There is no first hand evidence that Miller intimidated the charge nurses into changing Terry's schedule.

Brynn Lackey, a surgical technologist, accused Donna Miller of being vindictive and holding grudges. Lackey complained about vulgar conversation in the pediatric operating room (Room 10) and Miller's telling sexual jokes. She mentioned one particular comment made by Miller about being naked with her husband in her hot tub. Lackey repeated these accusations under oath at this instant proceeding. I credit her testimony regarding the coarse nature of Miller's conversation.[15] Lackey also accused Donna Miller of retaliating against staff members who complained about her husband. This truth of this accusation has not been established.

Damika Evans, a nursing fellow (student nurse), related a disagreement with Miller about counting instruments. Evans complained about Donna Miller cursing and what she considered to be sexually suggestive banter between Miller, on the one hand, and pediatric surgeons Alexander "Sam" Soutter and Allyson Askew, on the other. At the hearing, Evans testified that her principal complaint to Gorman concerned her treatment by Anita Holland, rather than by Miller. Respondent did not investigate this complaint or a complaint made by Holland about Evans after Miller's termination.

The HR representatives interviewed eight other staff members not picked at random. They did not interview the nurses who worked most regularly with Donna Miller; her husband Terry, Jon Hurwitz, Ruby Dizon, and Judy Giordano. (Tr. 1401.) They also did not interview the two surgeons for whom Donna Miller worked as much as 90 percent of the time, Dr. Alexander "Sam Soutter and Dr. Allyson Askew. In fact, Respondent rejected a request from Dr. Soutter that it talk to him about Miller's conduct. (Tr. 837–838.)

From five of the eight employees not selected at random, Paige Migliozzi, Lynda Engquist, Bobbie MacDonald, Desiree Hensley, and Teresa Ford, Respondent obtained the most negative comments and serious allegations against Donna Miller. Thus, the investigation was not an impartial search for the truth; it was effort to build a case against Donna Miller.[16]

Teresa Ford complained about Miller being intimidating and taking long lunches. However, Room 10, the pediatric surgery room in which Miller worked was generally self-sufficient and the length of breaks and lunches taken by Room 10 nurses had minimal, if any impact of the working conditions of nurses in other operating rooms. (Tr. 1401.) Moreover, ASC management was well aware of the extent that the Millers took longer breaks than other staff and did nothing to change this situation.

Lynda Engquist related that Miller talked openly about her love life with Miller's husband Terry, including one very graphic comment she stated was made in the lounge 2 months prior to her interview. She encouraged her interviewers to talk

[15] Paula Graling testified that Lackey never complained to her about Donna Miller's behavior, and that Lackey complains regularly about a lot of things. (Tr. 2198–2199.) When being interviewed by Gorman, Lackey also complained about Terry Miller and Cathy Gamble.

[16] Respondent places great emphasis on the fact that the HR interviewers did not mention Donna Miller's name in the interviews. However, they made the fact that they were investigating Miller apparent in subtle ways, e.g. (Tr. 1382), and by selecting employees to interview on the basis of suspected animus towards Miller.

to nurse Anita Holland. Holland was also a nonrandom interviewee. Holland, a friend of Miller's, did not corroborate Engquist's comments about graphically obscene comments on the part of Miller.[17] Engquist complained about Miller having an intimidating demeanor, but seemed to doubt Miller's ability to affect employees' schedules. In fact, as stated previously, it is clear from Respondent's management witnesses that Miller had no ability to affect the schedules of other employees.

Desiree Hensley indicated that other nurses were afraid that Miller could change their work schedules.[18] If true, there is no basis in this record for this concern.

HR interviewed Paige Migliozzi, the primary nurse educator in the ASC. Since Migliozzi did not testify at this proceeding I decline to find that any of the statements made by her are necessarily true unless corroborated by first-hand testimony. Respondent's explanation as to how Leanne Gorman came to interview Migliozzi is not credible (see p. 9). I infer that Gorman knew before she started the interviews that Migliozzi had made one or more of the compliance line calls and also knew that she would make serious allegations about Miller. Gorman did not ask Migliozzi the questions she asked other interviewees, but rather solicited negative comments about Donna Miller.

Migliozzi reported to Gorman that she heard Miller make a very graphic comment regarding how Miller and her husband engaged in sexual intercourse. Whereas Engquist and a hotline caller related that this comment was made in the lounge (GC Exh. 11, GC Exh. 16, Bates #03407), Migliozzi told HR that she overheard the statement in the pediatric operating room and that Miller was talking to Dr. Soutter in the presence of Damika Evans. While Evans told HR about cursing and sexual innuendos in the pediatrics operating room, she did not mention this incident.

Migliozzi also stated that Miller talked openly in the lounge about sex and screwing, that other employees were afraid of Miller and related some disagreements she had with Miller about counting instruments before and after certain types of surgery. Migliozzi also told the interviewers, but not in specific reference to Miller that, "down at the lunch table sexual comments are prevalent." (GC Exh. 16, Bates #03420.)

In response to Gorman's question about inappropriate behavior, Charge Nurse Bobbie MacDonald, another nonrandom interviewee who also did not testify in this proceeding, was reported as saying:

> Nothing that is atypical of environment. Suggestive language is part of the culture. Innuendos go on between doctors and staff in general including anesthesia but it's playful banter. It's not everyone—others are more prevalent crossing the line—it's both doctors and staff but certain people. More out of urology, ortho and podiatry it's the doctors. Certain staff outside of those services (named above) that get a little raunchy—graphic in description of things. Sexual comments; there are so many I can't say what. It goes on in the lounge when people are relaxed—people are laughing along with you. It's Donna Miller. She does have exceptional clinical skills. She just thinks she's a clown and thinks she's entertaining but people would take exception to what she's saying and others egg her on. I feel there has been manipulation to change assignments. . . . No one person stands out as manipulating over the others.

GC Exh. 16, Bates #03419.

Guna Perry, a former Inova employee, who rotated with MacDonald as charge nurse during the latter stages of Miller's employment, testified at trial that the atmosphere in room 10 was no different than that in other operating rooms. She also testified that she heard Donna Miller tell jokes of a sexual nature. (Tr. 1425.) I fully credit Perry's testimony. Respondent made no attempt to attack Perry's credibility.

On the basis of the testimony of Perry, Paula Hay, the statement taken from Bobbie MacDonald, and Chief Nursing Executive Pat Conway-Morana's email to Dr. Pasternak on February 25,[19] I infer that at least some of Respondent's managers were well aware of suggestive culture of the operating rooms long before it began its investigation of Donna Miller.

Moreover, if Bobbie MacDonald was aware that sexual innuendo and banter was most common in urology, orthopedics, and podiatry, I infer that management personnel who were routinely present in the ASC, such as Dr. Russell Seneca, Dobbing, Graling, and Lou Sanata were also aware that this was the case.

There was nothing new about Donna Miller's behavior in late 2008 and 2009. ASC management had tolerated her use of profanity and sexually explicit conversation for years. (Tr. 1992, 2028–2030.)

Miller's February 13, 2009 Email

On Friday, February 13, 2009, at 3:19 p.m., Miller sent an email to Paige Migliozzi, with a cc to their supervisor, patient care director Paula Graling. The email stated that it was from Miller and four other ASC nurses: Martha Porta, Paula Hay, Anita Hungate, and Laila Bailey. In typing the email, Miller confused Hungate, who did not authorize Miller to use her name, with Anita Holland, who did so.

The email stated:

Paige,

[17] Prior to her interview with Gorman, Margaret Donegan had complained to management about employees taking excessive breaks, and I infer that Gorman expected to obtain negative comments from Donegan and Cathy Laing, another nonrandom interviewee, about Miller in this regard and Miller's role on the scheduling committee.

[18] Leanne Gorman testified that:

> So, they [the scheduling committee, to which Miller belonged] did have the ability to change the schedule, or at least there was at least a perception from what was conveyed to me that the committee had the ability to change the days off for the employees that did not have a fixed schedule.
>
> Whatever perception was conveyed to Gorman was inaccurate, a fact she could easily have determined by talking to Respondent's management coordinator, Lou Sanata, who did control the nurses' schedules (Tr. 559–563, 592), or to Eileen Dobbing. (Tr. 1567.)

[19] R. Exh. 25 at B #15336.

> We are [word omitted] regarding the coordination of the fellows and follow up evaluations for each service. We haven't received any packets with the objectives/evaluations for each fellow as they rotate through our service in quite a while. In order to be better prepared for a comprehensive rotation in each service, it would be helpful to know who is coming, the learning objectives and the length of the rotation. We need a tool to evaluate the fellows and a way to document their progress in a timely fashion. We have not been asked for any feedback on the fellows on their progress and we feel that is an important piece of the fellowship program that we need to pay attention to. I know in peds that we need a break for a week before we have another fellow. The surgeons need it and we do too. Can you provide some assistance or guidance to us to help us with out concerns? We are committed to giving these fellows the best possible educational experience with all of our combined experience and guidance!

GC Exh. 62.

> Paige Migliozzi emailed HR Manager Leanne Gorman at 3:48 p.m. stating:
>
> I want to send you this email I just received from Donna. I am quite furious she decided to appoint herself as spokesperson for this group. She has had lot to say but hasn't said anything to me and been talking behind me. I am leaving now because I am quite furious, can we please talk Monday. . . .

R. Exh. 21.

At 4:42 p.m., the same day, Paul Graling replied to Miller and Migliozzi, with a cc email to Porta, Hay, Bailey, and Holland.

> It was my understanding that when Paige came on board she communicated with each of you and that some subsequent attempts at orientation modules were in the works. So far I have seen a sample Peds checklist and in fact I have seen a completed ENT orientation packet from Martha. I don't know who is the owner of each of these pieces of information but would welcome some discussion about how we would all like to proceed in the future to look at orientation and service rotation needs.
>
> I would also like to emphasize that proactive communication which take place in a collaborative problem solving forum is much more effective than a one dimensional group signed e-mail which puts everyone of the defensive. In the future, I would hope that each of you would use the direct method of coming to me that most of you are used to for solving issues such as that demand my immediate attention.

GC Exh. 62.

Migliozzi not only emailed HR manager Gorman, she also complained to Nurses Anita Holland and Paula Hay that the signers of the email were ganging up on her. She asked Holland and Hay if Miller was the leader of the group.

Graling testified that she did not remember having a conversation with Gorman about "that e-mail." (Tr. 2190.) Gorman testified that Graling called her and that she told Graling there was nothing wrong with Miller's email. (Tr. 1740.) Regardless of whether Graling was referring to GC Exh. 62 or R. Exh. 21, I infer that she did talk to Gorman between the time she received Miller's email at 3:19 and her response to Miller at 4:42. In fact I infer that it was a discussion with Gorman that led Graling to respond to Miller.

I also infer that higher level managers and agents of Respondent were aware of the email and Migliozzi's belief that Miller was the leader of a group of nurses seeking to undermine her. I find the testimony of Respondent's witnesses that nobody other than Gorman and Graling were aware of Miller's email to be incredible. Given the fact that Respondent was considering discharging or disciplining Miller in part for bullying other Inova employees, I infer that Gorman told other human resource managers, such as Julie Reitman and/or Ken Hull, about the email and Migliozzi's reaction to it, and that either she or Reitman or Hull informed other Inova managers about the email as another example of Miller's alleged bullying. I discredit Gorman's testimony to the contrary and find her to be generally a witness whose testimony cannot be credited when supporting Respondent's theory of the case.[20]

Monday, February 16, 2009, was the first workday for Migliozzi after the day she complained to Leanne Gorman about Miller's February 13 email and Miller appointing herself as spokesperson for her group. I infer that Gorman and Migliozzi spoke about the February 13 email and Miller, as Migliozzi requested. Gorman did not deny speaking with Migliozzi about "the email," she testified that she did not recall talking to her. (Tr. 1740.)

On February 16, Gorman spoke to Dr. Russell Seneca, Respondent's chief of surgery. She denied mentioning to Dr. Seneca the email she received from Paige Migliozzi on February 13, or the relationship between Migliozzi and Miller. I discredit her denial and infer that Ms. Gorman did discuss the email with Dr. Seneca and Migliozzi's complaints about Miller.[21]

Ms. Gorman's notes indicate that she spoke to Dr. Seneca about the compliance calls. Gorman knew that Migliozzi had made one or more of the hotline calls complaining about Miller. It defies credulity to believe that Gorman talked to Dr. Seneca on the first workday after she received another complaint from Migliozzi about Miller and did not mention it to Dr. Seneca and possibly others—particularly since, as I infer, she had talked to Migliozzi that morning about Miller's email.

Gorman testified that she had one or two conversations with Dr. Seneca, but did not take contemporaneous notes of the con-

[20] Gorman consulted with Reitman with respect to many of the details of her investigation. She obtained advice on formulating her interview questions from Reitman and Hull. (Tr. 1730.) She terminated her fact-finding pursuant to direction from Reitman. (Tr. 1754.) It defies credulity that she failed to mention the February 13 email and Paige Migliozzi's reaction to that email to Reitman, as the most recent example of Miller creating a hostile work environment, and/or Miller becoming a spokesperson for nurses who were disenchanted with working conditions in the ASC.

[21] At Tr. 173, Gorman denied recalling what Dr. Seneca said to her about Donna Miller.

versation(s). However, she made notes of this conversation on February 19, or later. (Tr. 1764–1766.) Gorman's notes are as follows:

> On 2/16/09 I spoke with Dr. Seneca about the compliance calls since two physician names were mentioned. He felt there was no reason to involve the physicians. He knows the history of Donna Miller delt [sic] with her over her Decision Making Suspension for unprofessional behavior in the past. He stated that Donna is a vindictive person and needs to go. Although her clinical skills are excellent we can't retain someone that displays this kind of behavior. He said that if we were to keep someone that displays this kind of behavior then the Studer Principles mean nothing and he fully supports her termination. He says he would handle the physicians since they would not be happy about the decision.

R. Exh. 22, B #1522.

I conclude that Dr. Seneca, who did not testify in this proceeding, was heavily involved in the decision to terminate Donna Miller.[22] There is no other credible explanation for Gorman's call to him on February 16, or Eileen Dobbing's testimony that she kept Dr. Seneca updated during the whole process concerning Donna Miller's employment. (Tr. 1558–1564.) From Dobbing's testimony I infer that she discussed with Dr. Seneca whether or not Miller should be fired. There is no evidence that Dr. Seneca discussed Miller's employment or Respondent's investigation of Miller with the physicians that worked with her.[23] I infer that Dr. Seneca communicated his opinion to Dr. Pasternak and/or others that Miller should be fired. I infer his views were taken into account in Dr. Pasternak's decision to fire Miller.

In this record there is no basis for Dr. Seneca's opinion that Miller was "a vindictive person and needs to go," apart from his involvement in the 2005 discipline and the knowledge that I infer he had regarding Miller's email to Migliozzi on February 13. I also note that Gorman's notes do not indicate that she discussed Miller's use of profanity or talk about sex, only her vindictiveness, which would also indicate that they discussed Miller's email to Migliozzi.

Respondent Places Donna Miller on Administrative Leave

On February 17, 2009, the day after Gorman talked to Migliozzi and Dr. Seneca, Donna Miller was summoned to a meeting with Patient Care Director Paul Graling and Human Resources Manager Gorman. Gorman informed Miller of the accusations made against her during Gorman's investigation. Miller denied them all except that she admitted she talked about spending New Year's Eve naked in a hot tub with her husband. She was placed on administrative leave pending completion of Gorman's investigation of her conduct.

Respondent Terminates Donna Miller's Employment

There is very little evidence as to what transpired between February 17 and 26, when Inova's CEO Dr. Reuven Pasternak decided to terminate Miller. I infer that there were many discussions among management personnel regarding Miller's fate that are not in this record. Other deliberations are mentioned in passing without any specific testimony about what was discussed.

Graling and her supervisor, Eileen Dobbing, met with Gorman, Julie Reitman, Gorman's supervisor in the human resources department, and Patricia Conway-Morana, Inova's chief nursing executive, on February 25, 2009. (Tr. 274, 1785.) There is very little evidence as to what was discussed. Of those in attendance, Graling, Gorman, and Dobbing testified; Reitman and Conway-Morana did not. Other than recalling that she asked Conway-Morana to consider transferring Miller, Dobbing could recall little about the meeting. (Tr. 1555.) Graling recalled little else. Reitman may have reviewed a short memo (GC Exh. 7), which summarized the results of Gorman's investigation.[24] The fifth bullet point of this memo states:

> Donna has previously received a Decision Making Suspension in April '05 for inappropriate conduct in the workplace. She was counseled in December '08 by Paula Graling regarding her inappropriate behavior and language that had been brought up by other staff members. Donna became very upset in the course of the conversation with Paula and began to use profanity again and left the office angry.

Prior to the February 25 meeting with Conway-Morana, Reitman and Gorman had spoken with Respondent's in-house counsel, Houeida Saad. Reitman's memorandum mentions two recommendations regarding Donna Miller's fate, either termination or a final written warning and transfer to another Inova facility. The memo does not indicate who proposed these two alternative courses of action. Neither Reitman nor Saad testified in this proceeding and there is absolutely no evidence as to how they arrived at these recommendations or what role their recommendation had in Respondent's decision to terminate Miller.[25]

Gorman testified that "the February 13 Donna Miller e-mail" was not discussed at the meeting with Conway-Morana. Re-

[22] Respondent's counsel objected to the General Counsel's inquiry regarding Dr. Seneca's role in the termination of Donna Miller on the grounds that Eileen Dobbing had not testified that Dr. Seneca was involved in the decision and that there was "no allegation" that he was involved. (Tr. 1560.)

Leanne Gorman testified that her notes regarding her conversation with Dr. Seneca were omitted from several versions of her investigative report. The reason for excluding these notes from versions of report provided to certain management officials is not convincingly explained in this record.

[23] Dr. Askew testified that she talked to Eileen Dobbing as to whether she could do anything on behalf of Miller, but did not testify to any contact with Dr. Seneca. Dr. Soutter's testimony about Dr. Seneca relates only to Respondent's disciplining him for protesting Miller's discharge in late March.

[24] Since Reitman did not testify, I am not certain that GC 7 was drafted on or about February 25.

[25] Gorman testified that she was not involved in the decision to terminate Donna Miller but that she made a recommendation to Julie Reitman. (Tr. 99–100.) Having found Ms. Gorman not to be a credible witness, I do not conclude that these recommendations originated with her.

gardless of whether this is technically true, I infer that Miller's email and Migliozzi's reaction to it were discussed for the same reasons I find it incredible that Gorman did not mention this to Dr. Seneca. This is particularly so because Conway-Morana cited Miller's intimidating behavior as a reason she believed that Miller should be terminated. It defies credulity to believe that the most recent example of Miller's alleged vindictiveness was not discussed.

Paula Graling testified that Miller's intimidating behavior was one of the subjects discussed at the meeting she attended with Conway-Morana. (Tr. 274, 314.) I infer that the latest example of Miller's intimidating behavior, the February 13 email was discussed.

Dobbing investigated the possibility of transferring Miller to another Inova facility and having her go into Respondent's Employee Assistance Program (EAP). Dobbing called Inova's Alexandria Hospital to inquire as to whether Miller could be transferred to Alexandria. She terminated her efforts in this regard after being informed on February 26, that Dr. Reuven Pasternak, the CEO of Inova Fairfax, was "pushing" for Miller's termination. (R. Exh. 9, Tr. 1509–1510.)

At 6:04 p.m. on February 25, Conway-Morana sent an email to Dr. Pasternak and others.[26]

> Just wanted you to know that Julie Reitman from HR met with Eileen and me today about an employee issue. We have a 20+ year nurse that we have had several hotline calls about- profanity, vindictive with schedule, sexual innuendos, etc, but a great OR Nurse. . . . Also, her husband works in the same department and the interactions between them are not appropriate (I thought we had a policy against that!!). She has been warned in the past about her intimidating and inappropriate behavior—4 years ago—and recently. Personally, I think she should be terminated, but Eileen wants to salvage an OR nurse, but not here. She grieved her last disciplinary action and I am sure she would again and I'm not convinced that we have enough documentation to support this decision.
>
> We have conferred with legal and have agreed that she can not work on this campus (she is on administrative leave). Eileen will talk to her counterparts at the other Inova ORs and see if anyone is willing to take her if she has a mandatory EAP referral and is put on a PIP with a final written warning that they will accept the responsibility of following through on. If, and this is a big IF, there is another OR director that is willing to take a chance on her, we would allow a transfer. If not, we will terminate her.
>
> . . . We also feel that we need to do education on appropriate behavior to all the OR staff as Eileen agrees it is too prevalent (I know from my clinical days, that the OR teams sometimes get a little too chummy) . . .

R. Exh. 25.

Conway-Morana did not testify in this proceeding. Thus, there is no evidence as to why she believed that Miller should be fired apart from what she mentioned in the email and no evidence as to why she did not believe Respondent did not have enough documentation to support termination or involuntary transfer.

Dr. Pasternak responded to Conway-Morana on February 26, at 8:16 a.m. In this response he effectively decided to terminate Miller:[27]

> We need to talk about this case. We are moving to a zero tolerance attitude toward of physicians who violate a good citizen policy with regard to their behavior on the premise, which I fully support, that being a good physician and abusive individual are mutually exclusive descriptions. . . . I believe the same is true of a nurse. Describing a nurse as someone using profanity, being vindictive with the schedule, and acting/speaking with sexual innuendos with multiple documented episodes of intimidating and inappropriate behavior cannot also include describing them as a "great OR nurse." She may be a good technician, but she is not a good professional. Keeping them on sends a message of desperation and acceptance of this conduct that I cannot support, and I don't think the other CEOs would want this either. . . .

R. Exh. 25.

Given the text of this email I infer that someone had informed Dr. Pasternak of the latest example of Miller's intimidating behavior, her February email to Migliozzi. It is beyond belief that in informing Dr. Pasternak about Miller's intimidating behavior, that someone did not tell him about the latest example, her email to Migliozzi on February 13.

At 8:23, Conway-Morana emailed Eileen Dobbing that, "Just wanted you to know that Reuven is pushing termination."

R. Exh. 9.

At l:46 p.m., HR Director Ken Hull emailed Julie Reitman. He stated, "We need to close the loop with Pat tomorrow with respect to her follow-up with Reuven. . . ."

GC Exh. 71.

This email establishes that Hull did not know yet whether a decision had been made to terminate Miller and was certainly not waiting for Dr. Christiansen to make this decision, as Respondent suggests. He was waiting to hear from Pat Conway-Morana.

At 2:42 p.m. Conway-Morana emailed Dobbing, Reitman, Ken Hull, the head of Respondent's human resources department and Dr. Patrick Christiansen, the administrator of the

[26] Respondent contends that the task of determining the level of discipline was assigned to the Hospital Administrator, Dr. Patrick Christiansen because Eileen Dobbing was a contract employee. Since Dobbing signed a written warning for Judy Giordano, I infer that this explanation is false. Moreover, it is clear that Dr. Pasternak, not Dr. Christiansen, made the decision to fire Miller.

[27] I discredit Dr. Pasternak's testimony at Tr. 2085 & 2102 suggesting that someone other than he made the decision to terminate Donna Miller.

Inova Fairfax campus, "I think we need to move forward with termination."

R. Exh. 25.

On the basis of Respondent's Exhibits 9 and 25, I find that the decision to terminate Donna Miller was made between 8:23 and 2:42 on February 26, 2009, by Dr. Pasternak. I infer that Dr. Pasternak and Ms. Conway-Morana communicated during this period, possibly by telephone. Indeed (GC Exh. 71), the email from HR Director Ken Hull to HR Manager Julie Reitman, suggests as much.

This record also establishes that Dr. Pasternak decided to terminate Donna Miller without reviewing any of the documents of Respondent's investigation. In fact, the only basis for his decision was the email sent to him by Pat Conway-Morana on February 26, at 6:04 p.m. and oral conversations about which there is nothing in this record. There is no evidence that he heard or was aware of Miller's defense of her conduct when he effectively decided to fire her. What is clear is that Dr. Pasternak was aware of the 2005 discipline, cited by Conway-Morana in her recommendation that Miller be terminated. Moreover, I infer that he was aware of the February 13 email.

At 3.29 p.m., Dr. Christiansen instructed Ken Hull to move forward with Miller's termination. The email chain in Respondent's exhibit 25 establishes that Dr. Christiansen was merely communicating a decision that had already been made by Dr. Pasternak.[28]

Dr. Pasternak testified that he rarely is involved in personnel decisions. In fact, there is no evidence that Dr. Pasternak has been involved with or made the decision to terminate any other nonsupervisory employee. Respondent has offered no convincing nondiscriminatory explanation why he effectively made the decision to terminate Miller.

As noted previously, Dobbing also kept Dr. Russell Seneca "updated" during the period that termination of Donna Miller was under consideration in February and March 2009. Seneca had upheld the disciplining of Miller in 2005 for raising complaints about the treatment of the ASC nurses in transferring surgeries from the Main OR to the ASC. Dobbing met with Seneca at least once in person and discussed Miller's discipline or discharge. There is no evidence as to why Dobbing met with Seneca, what was said, or the extent of Dr. Seneca's involvement in the termination decision. Dr. Seneca did not testify in this proceeding. Thus, there is no evidence as to whether or not Seneca talked to Pat Conway-Morana before she recommended to Dr. Pasternak that Miller be terminated.

I infer that Seneca's opinion that Miller should be terminated and his reliance on the 2005 discipline played a role in the Respondent's decision to fire her. I also infer that Seneca's awareness of Miller's email to Migliozzi on February 13, and Migliozzi's reaction to that email, played a role in Seneca's recommendation to higher level management that Miller be fired.

I draw adverse inferences from Respondent's failure to call as witnesses several management witnesses, who are still employees of Respondent and who have knowledge about the reasons for Donna Miller's termination and the process by which Respondent decided to terminate her.

Neither Dr. Seneca, Conway-Morana, Ken Hull, nor Reitman testified in this proceeding. I draw an adverse inference that their testimony, if truthful, would have been damaging to Respondent's case, *International Automated Machines*, 285 NLRB 1122 (1987), enfd. 861 F.2d (6th Cir. 1988). All four individuals certainly had knowledge regarding the process by which Respondent decided to discharge Miller and the reasons for her termination that do not appear in this record. Respondent is not absolved from its responsibility for presenting a persuasive case by the exchange its counsel had with me at the June 10, session of this trial at Tr. 2076–2077:

> [MR. DORAN] We did want to talk just a little bit more about what might happen from this day going forward because it seems to us there could be an opportunity that this is the last day of hearing, which I imagine might be advantageous. Thinking about this and keeping in mind your comment about the long [law of] diminishing marginal returns—
>
> JUDGE AMCHAN: Whatever it is.
>
> MR. DORAN: —exactly, we spoke about this, and we want to make sure you have all the evidence you think is necessary to make a decision on the record. So we thought about other witnesses, and we put those into two groups.
>
> The first group I characterize as management witnesses. Just so you know, and I'm not sure if it's clear now, but what our thinking was is that we've presented management witnesses in Ms. Miller's direct chain of command. So it's Paula Graling, her direct supervisor Eileen Dobbing, and then up to Patrick Christiansen, and then Dr. Pasternak, the CEO, who you will hear from today. There's obviously other people who were aware of this situation and who weighed in, like Pat Conway-Morana, the chief nursing executive, Julie Reitman, who Ms. Gorman consulted with in HR and Ken Hull in HR. As we see it, those individuals are not essential because while they participated or in some way they weren't making the decision in the line of command, so we didn't intend to call them, but we didn't know if you thought it was essential that we do call them.
>
> JUDGE AMCHAN: Well, I think it's up to you.

A similar discussion occurred regarding Paige Migliozzi. A judge has the authority to exclude evidence that is needlessly cumulative, or wastes time. However, it is the parties' responsibility, not the judge's, to determine what evidence should be introduced in order to present a persuasive case. As the Board noted in Appendix B to its decision in *Otis Elevator*, 255 NLRB 235, 239–240 (1981):

[28] I do not credit any of Dr. Christiansen's testimony. First of all, it is perfectly clear that he did not make the initial decision to terminate Donna Miller as he testified.

Dr. Christiansen also testified that he met with Leanne Gorman and reviewed her investigative file before deciding to terminate Miller. (Tr. 1347.) Gorman testified she did not send any materials to Dr. Christiansen until the week prior to Donna Miller's appeal meeting on March 18. Thus, Dr. Christiansen's testimony that he made the initial decision to terminate Miller and the reasons for the termination are inaccurate.

> We note at the outset that the purpose of a hearing is to give all parties an opportunity to present such evidence that will allow an administrative law judge to make certain findings of fact. The responsibility of "making a record" supporting one's position not only devolves upon the parties, but particularly devolves upon them during the hearing and before the record is closed. Thus, it is then that each party must make its own judgment as to whether it has presented the best possible case, so that, in the event of a possible "misapprehension" or adverse credibility resolution by an administrative law judge, the requisite evidence has already been placed in the record so as to allow the Board to consider a party's legal arguments on appeal.

Respondent Informs Donna Miller That Her Employment Has Been Terminated

Miller was summoned to another meeting with Paula Graling and Leanne Gorman on March 3, 2009. Graling read from a document and informed Miller that she was being terminated. Graling told Miller that she was being terminated for creating a hostile work environment, excessive sharing of the details of her personal life and using inappropriate language. I infer that part of the hostile work environment that Miller allegedly created in the minds of Respondent's decisions makers was the February 13 email that made Paige Migliozzi "furious."

Miller requested a copy of the document from which Graling had read to her. Leanne Gorman informed her that it was Respondent's policy not to give it to her.

Respondent Upholds the Termination in Two Appeals Proceedings

On March 18, 2009, Miller attended a meeting to appeal her termination with Dr. Patrick Christiansen, the administrator of Fairfax Inova Hospital, who is also a vice president of Inova Health Systems. Dr. Christiansen upheld her termination.

On April 7, 2009, Miller attended another meeting to appeal her termination with Dr. Reuven Pasternak, the chief executive officer of Inova's Fairfax campus and an Executive vice president of Inova Health Systems. Dr. Pasternak also upheld her termination. There is no evidence that Miller was aware that it was Dr. Pasternak who had decided to fire her in the first place.

ANALYSIS

Respondent Violated Section 8(a)(1) in Terminating Donna Miller

In order to establish that an employer violated Section 8(a)(1) in discharging or disciplining an employee, the Board generally requires the General Counsel to make an initial showing sufficient to support an inference that the alleged discriminatee's protected conduct was a 'motivating factor' in the employer's decision. Then the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct, *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (lst Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393, 399–403 (1983); *American Gardens Management Co*., 338 NLRB 644 (2002). Unlawful motivation and animus are often established by indirect or circumstantial evidence.

The Board will not seek to quantitatively analyze the effect of the unlawful cause once it has been found. "It is enough that the employees' protected activities are causally related to the employer action which is the basis of the complaint. Whether that 'cause' was the straw that broke the camel's back or a bullet between the eyes, if it were enough to determine events, it is enough to come within the proscription of the Act." *Wright Line*, supra at 1089 fn. 14; accord: *Bronco Wine Co*., 256 NLRB 53, 54 fn. 8 (1981).

In the instant case, all the reasons, and possibly the principal reason, for Respondent's discharge of Miller are not apparent from the record. However, I find that there is a causal relationship between the decision to discharge her and both the February 13 email and her 2005 protected activity. In this regard, it is important to note that while Respondent was obviously building a case against Miller before February 13, no decision was made to terminate her until after Respondent was aware of the email, which I infer was known and discussed at the highest levels of Respondent's management, as a further example of Miller's alleged vindictiveness and creation of a hostile work environment.

Protected Concerted Activity

Section 8(a)(1) of the National Labor Relations Act provides that it is an unfair labor practice to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. Section 7 provides that, "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . . (Emphasis added.)"

In *Myers Industries (Myers I),* 268 NLRB 493 (1984), and in *Myers Industries (Myers II)* 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity. Individual action is concerted so long as it is engaged in with the object of initiating or inducing group action, *Whittaker Corp*., 289 NLRB 933 (1988); *Mushroom Transportation Co*., 330 F.2d 683, 685 (3d Cir. 1964).

Additionally, the Board held in *Amelio's*, 301 NLRB 182 (1991), that in order to present a prima facie case that an employer has discharged an employee in violation of Section 8(a)(1), the General Counsel must establish that the employer knew of the concerted nature of the activity.

Donna Miller engaged in protected concerted activity in April 2005 and again on February 13, 2009, by sending the email to Paige Migliozzi and Paula Graling on behalf of herself and other nurses. The portion of the email asking for a week's hiatus between the assignment of student nurses to the various service lines is particularly relevant to the terms and conditions of employment of the nurses who authorized Miller to send this

email. Respondent was aware of this protected activity and displayed animus towards it.[29]

Respondent's animus towards the 2005 protected activity is established by the discipline it issued to her as a result. The casual relationship between the 2005 protected activity and Miller's discharge is established by Respondent's documents and testimony.

There is also direct evidence of Respondent's animus towards Miller as a result of the February 13 email in Paula Graling's responsive email and the email from Migliozzi, a supervisor and agent of Respondent, to Leanne Gorman. Additionally, I infer animus on the part of Respondent's management and a causal relationship between the email and Miller's discharge from a number of other factors. One of these is the clearly pretextual nature of the reasons given for her termination, which are set out in great detail below. Another factor is the timing of Miller's suspension. Miller was suspended (or placed on administrative leave) on February 17, the day after Migliozzi spoke to Gorman about the February 13 email and Gorman spoke to Dr. Seneca about Donna Miller. As mentioned previously, I infer the February 13 email was discussed by Gorman and Dr. Seneca on February 16.

I find that the General Counsel has made a prima facie case that Donna Miller's termination was causally related to both her April 2005 protected activity in complaining about the working conditions of ASC nurses and her February 13 email to Paige Migliozzi and Paula Graling. Respondent has failed to rebut the General Counsel's prima facie case.

Donna Miller's 2005 Protected Activity and its Relationship to Her 2009 Discharge Were Fully Litigated by the Parties, Although not Pled

A causal relationship between Miller's April 2005 protected activity is established by the emails of Respondent's managers citing it as a consideration for her termination. Although, the April 2005 protected activity is not mentioned in the complaint, its relevance to Miller's discharge was fully litigated. There is no reasonable way this issue could have been tried any differently had the complaint alleged that Miller's discharge was related to the 2005 protected activity. *Pergament United* Sales, 296 NLRB 333, 335 (1989); *Garage Management Corp*., 334 NLRB 940, 941 (2001). The evidence establishing the protected nature of Miller's April 2005 conduct entered this record via Respondent's documents and Respondent's exhibits. (GC Exh. 17, p. 30, R. Exh. 22, B #1522, R. Exh. 25.)

Respondent also established the relationship of the discipline imposed as a result of this conduct to Miller's 2009 discharge. Respondent never objected to testimony about Miller's prior discipline[30] and elicited testimony on this subject from its own witnesses, Eileen Dobbing (Tr. 1515), and Leanne Gorman (Tr. 1785–1786), and from Donna Miller (Tr. 1605–1607). Respondent also mentioned the 2005 discipline and Dr. Seneca's reliance on it in recommending Miller's termination in its posttrial brief at pages 11, 20, and 37 at footnote 12.

Respondent's documents conclusively establish that Miller engaged in protected activity, that her activity was not such as to forfeit the protections of the Act and that Respondent considered this protected activity in discharging Miller in February 2009. Even had the 2005 activity been mentioned in the pleadings, Respondent could not have credibly contended that Miller's conduct was something other than that set forth in its documentation, or that her outburst did not pertain to the working conditions of herself and other ASC nurses. Her 2005 complaints were clearly concerted and for the mutual aid and protection of herself and her colleagues.

Pursuant to *Atlantic Steel Co*., 245 NLRB 814, 816–817 (1979), an employer violates the Act by discharging or disciplining an employee engaged in the protected concerted activity unless, in the course of that protest, the employee engages in opprobrious conduct, costing him or her the Act's protection. In assessing the conduct, the Board assesses four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practices.

Consideration of these factors leads me to conclude that Miller's 2005 protected conduct does not come close to that which would forfeit the Act's protection. This is established by Respondent's documentation of Miller's conduct. Merely speaking loudly or raising one's voice while engaging in protected concerted activity generally will not deprive an employee of the Act's protection. *Alton H. Piester*, LLC., 353 NLRB No. 33, slip op. at 6 (2008); *Firch Baking Co*., 232 NLRB 772 (1977). The fact that the April 2005 protected conduct was not sufficient to forfeit the protections of the Act is established by the fact that Respondent did not terminate Miller for this conduct; it gave her a "decision-making" disciplinary notice.

Respondent could not have contradicted its own documents in an effort to prove that Miller's 2005 conduct was not protected by Section 7. Similarly, it is Respondent's evidence that establishes the causal relationship between Miller's 2005 protected conduct and her 2009 discharge.

The Reasons Advanced by Respondent for Miller's Discharge are Clearly Pretextual

[29] Respondent's assertion at p. 38 of its brief, that the General Counsel must establish direct knowledge of Miller's protected activity on the part of those managers who made the decision to terminate Miller, is contrary to Board precedent, *Rogers Electric, Inc.,* 346 NLRB 508, 516 (2006). Normally, the knowledge of a supervisor or agent is imputed to a corporate entity. However, where credible evidence establishes that the decision maker was not aware of protected activity, the Board may find that an employer did not have that knowledge. That is not the case here. I do not credit the testimony of Respondent's witnesses that nobody other than Graling, Gorman. and Migliozzi aware of the February 13 email, and/or that Miller had sent a group email that offended Migliozzi. In fact, I infer that those who decided on Miller's termination were aware of the February 13 email, or its contents, as well as Miller's 2005 discipline.

[30] For example, at Tr. 2101–2102, Respondent did not object when Dr. Pasternak, in responding to a question from the General Counsel, indicated that Miller's 2005 discipline was a factor in her discharge.

As noted by the Court of Appeals for the Ninth Circuit in *Shattuck Denn Mining Corp. v. NLRB,* 366 F.2d 466, 470 (9th Cir. 1966):

> Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise no person accused of unlawful motive who took the stand and testified to lawful motive could be brought to book. Nor is the trier of fact-here a trial examiner-required to be any more naïf than is a judge. If he finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal-an unlawful motive-at least where, as in this case, the surrounding facts tend to reinforce that inference.

Accord*: Fast Food Merchandisers*, 291 NLRB 897, 898 (1988), *Fluor Daniel, Inc.*, 304 NLRB 970, 971 (1991).

I find that Respondent's stated reasons for Miller's discharge are pretextual for a number of reasons. However, the motive for Respondent's investigation of Miller cannot be gleaned from this record since the investigation started and was mostly completed before Miller engaged in any protected activity that has been established on this record, other than that in 2005. I do not infer that the investigation was motivated solely or even primarily by Miller's 2005 activities.

However, I infer the stated reasons for her discharge, other than her 2005 discipline, are not the real reasons for her discharge on the basis of the following factors.

One of the reasons is the unprecedented and unsatisfactorily explained involvement of Respondent's highest levels of management. Dr. Pasternak is usually involved in personnel decisions only if it involves an individual directly reporting to him, such as the chief financial officer or the department chairs (Tr. 2082). In fact there is no evidence of Dr. Pasternak's involvement in the discipline or discharge of any other rank-and-file employee.[31] Respondent has not established any persuasive nondiscriminatory explanation for Dr. Pasternak's involvement in the termination of Donna Miller.

A second reason I find most of the reasons advanced by Respondent for Miller's discharge to be pretextual is the biased investigation conducted by Respondent to build a case against her and the inconsistent and in some cases deliberately false testimony of Respondent's witnesses as to how this investigation was conducted.

A third reason is Respondent's failure to discipline Miller or warn her that she might be disciplined for her behavior prior to terminating her employment. Eileen Dobbing clearly had authority to give Miller a final written warning on the basis of Gorman's investigation, yet the decision regarding discipline was given to higher level management without giving Miller an opportunity to modify her behavior. Written discipline of this sort would have been far more likely to get Miller's attention than the nondisciplinary discussion she had with Paula Graling in December.

A fourth reason is the disparate treatment of Miller compared with the discipline issued to employees exhibiting similar conduct. For example, in July 2007, Respondent issued a final written warning to a surgical technician for showing sexually explicit photographs of herself to other employees. Three weeks before that the employee was issued a written warning for not being accessible when she was on call on two different occasions within 2 weeks. Two months earlier, in April 2007, the employee had been counseled for not showing up for work on 1 day and not being on time 3 days later. (GC Exh. 85.)

A fifth reason for finding Respondent's reasons for the discharge to be pretextual is the absence of any evidence of "inappropriate" conduct by Miller between her meeting with Paula Graling on December 22, and her suspension on February 17,—apart from the February 13 email.

A sixth reason is the departure from Respondent's policies and practices, such as Paula Graling's call to Leanne Gorman after her meeting with Miller on December 22, and Graling's forwarding of her notes of that conversation to Respondent's human resources department.

A seventh reason is the fact that Miller's behavior prior to her discharge was no different than it had been for years and had been tolerated by Respondent.

An eighth reason is the fact that Miller's behavior was consistent with the culture of Respondent's operating rooms and that Respondent tolerated the same behavior by a number of physicians who performed surgery at its facility and possibly similar behavior on the part of other staff members. Indeed, there is no evidence that Respondent did anything after its investigation of Miller to change the behavior of the physicians working in the ASC—apart from disciplining Dr. Soutter for protesting Donna Miller's discharge.

A ninth reason is Respondent's failure to call as witnesses the following individuals who were involved in the deliberations and/or decision to terminate Miller: Pat Conway-Morana, Ken Hull, Julie Reitman, and Dr. Russell Seneca.

A 10th reason is the gaps in the decision -making process relating to the termination, i.e., an explanation as to what transpired between Dr. Pasternak's email to Pat Conway-Morana and her email instructing other managers to move forward with termination. There is also a general absence of relevant evidence regarding conversations that I infer took place among the managers involved in Miller's termination, including Dr. Pasternak, Pat Conway-Morana, and Dr. Seneca, Ken Hull, and Julie Reitman.

A final reason is the inconsistency of Respondent's testimonial evidence and in some cases, its clearly inaccurate nature.

In view of my finding that Respondent's reasons for investigating Miller and discharging her are pretextual, I find that it has not met its burden of rebutting the General Counsel's prima facie case. It failed to prove that it would have fired Miller had she not engaged in protected activity in April 2005 and sent the February 13, 2009 email to Migliozzi and Graling. I thus find

[31] Dr. Christiansen, when testifying inaccurately that he made the initial decision to terminate Donna Miller, also testified that he could not recall making an initial termination decision with respect to any other employee. (Tr. 1364.)

that Respondent violated Section 8(a)(1) in discharging Miller in part due to both her 2005 protected activity and the February 13, 2009 email.

Final Written Warning Issued to Judy Giordano

On March 18, 2009,[32] Judy Giordano and six other nurses from the ASC went to the human resources office to show their support for Donna Miller. Miller met with Dr. Patrick Christiansen, the administrator of Inova Fairfax Hospital, that day to appeal her termination. Vivian Stancil, a human resources employee, told the six nurses they could not wait for Miller in the HR office. The six left and proceeded down a hallway where they encountered Miller and Michelle Melito, another HR representative.

Michelle Melito's notes of this incident relate the following:

> The meeting concluded at approximately 4:30 pm. Donna and I walked back to the Support Services Building. As we approached the elevator lobby, we were greeted by a group (approximately seven) of her former coworkers with ASC. They were waving at her and saying that they were just kicked out of HR. We came closer to the group and someone extended a hug to Donna. One staff member took her hand an firmly pushed me on my left shoulder as I was passing her, seemingly as a gesture to turn me around so she could make a statement to me. She didn't introduce herself, but said "listen, we love her" pointing at Donna. She went on to talk about how many years of experience they have combined on the unit. . . . She said that Fairfax is making a big mistake and continued to say that they love her. She was visibly agitated and gestured at me with a pointed finger. I was caught off guard by the physical contact and wasn't clear on all that was being said, but I did say that "there is a way to do this, but not here/like this. . ." and shook my head. I continued to acknowledge their collective frustration, but gestured that this isn't the time or place and headed back to HR.

GC Exh. 22, Bates #01471.

These notes were written after Melito discussed her encounter with her supervisor, Julie Reitman and HR manager Vivian Stancil, possibly several hours after the event. (Tr. 2053–2054.) Melito's relevant testimony at trial is as follows (Tr. 20492051):

> A. Okay. Donna and I walked back toward the support services building. That's where the elevator lobby is and the exit to the garage. As we were walking down the hall and basically turning the corner to where the elevators were, there was a group of I'm assuming nurses coming through, former coworkers of Donna, coming toward us. They saw Donna. They were excited to see her. They were waving, saying things like, oh, there you are, saying that they were being kicked out of HR, and, you know, they all just started gathering around us. And I could tell, well, you know, I don't really have a place here anymore. So someone came, I remember someone went to hug Donna, and then I was just basically going to walk through them and go back to human resources, but one individual approached me, took her hand and basically pushed my shoulder. I don't know if it was to stop me or turn me around, and then proceeded to say a number of things to me. But she was pretty animated. I remember she was pointing her finger, telling me things like we love her, you know, you don't know what you're doing, we have however many years of experience among all of us, you can't get that anywhere, you're making a mistake, we love her again, just basically being animated, emotional. And I remember just being taken off guard and putting my hands up and saying something like, you know, not here, like not the place or something like that, and then walking back.

I find that Giordano did not "push" Melito. The surveillance video (GC Exh. 30), CD 2, of this incident shows that the entire encounter lasted no more than one minute.[33] The video is inconclusive but shows that Giordano may have touched Melito, who was talking to another nurse, in order to get her attention. From the video, it appears the Melito turned to her right to talk to another nurse. At this point, Melito's back was turned to Giordano. Melito then turned around to speak with Giordano for less than one minute.

I discredit statements, such as that made in Leanne Gorman's affidavit, that Giordano "shoved" Melito or that Melito was "shaken up" by the encounter. I discredit Eileen Dobbing's testimony at Tr. 1526 that Melito was visibly upset by the encounter or that Melito told her she was upset.[34] Dobbing's testimony that, "Michelle was pretty afraid of Judy" (Tr. 1530), is an outright fabrication, and is further evidence of Respondent's determination to make Giordano's behavior appear worse than it actually was. The surveillance video conclusively establishes these statements to be false.

Melito's facial expression, as she walked towards the camera and away from the nurses does not indicate that she was shaken or upset by the incident at all. In fact, her expression and gait suggests that nothing unusual or upsetting to her had occurred. Moreover, Melito did not testify that she was, "shaken up," upset or afraid of Giordano.

Melito's notes and testimony are in part the product of her conversations with Reitman, Stancil, and perhaps others. That Respondent sought to depict Giordano's conduct in the worst possible light is established by the discipline it issued her,

[32] The surveillance video, GC 30, is erroneously labeled March 19. All parties agree that the incident occurred on March 18.

[33] I have watched the surveillance video (GC Exh. 30, CD #2), several times. The encounter between the nurses and Melito is visible only on camera 8. It starts after 16:42:10 (4:42:10) and is over by 16:43:10. The area in which the encounter takes place is very dark. Eileen Dobbing, who viewed the video, testified that the video was not even clear enough to identify Giordano as the person addressing Melito. (Tr. 1526–1529.)

[34] Dobbing may have learned about Melito's encounter with Giordano from H.R. Manager Vivian Stancil, who had already displayed tremendous animosity towards the group of nurses who came to the human relations office to show their support for Donna Miller on March 18, as well as those who questioned the fairness of Respondent's investigation of Miller at a March 4 staff meeting.

which is way out of proportion to anything she might have done and the embellishment of the incident by Leanne Gorman and Eileen Dobbing.

Giordano did not express any animus or hostility towards Melito or Respondent. The statements taken by Respondent from the other six nurses who were present makes that quite clear. (GC Exh. 28.) Moreover, Respondent knew this was the case.

A draft of Giordano's disciplinary form (GC Exh. 27), stated, "From reviewing the surveillance video, it is apparent that you did touch the left should[er] of the HR Rep. This touch was not done in an aggressive manner." In the final version of the warning, which was presented to Giordano (GC Exh. 26), this language was omitted. There is no explanation for its deletion and I conclude that this language was deleted because Respondent was determined to discipline Giordano in such a way as to intimidate her and Donna Miller's other supporters.

Giordano was placed on administrative leave and was given no information as to the level of discipline she was to receive until March 23, 2009. I find this was done with the intent of intimidating her and the other nurses supporting Donna Miller. On March 23, Paula Graling, Giordano's immediate supervisor, called her and told her that she was not being fired and would be paid for the days she was off from work.

On March 24, Eileen Dobbing in the presence of Inova's Human Resources Director Kenneth Hull, presented Giordano with a final written warning, the last step in Respondent's progressive discipline program short of termination. The decision to issue this warning was made by Hull or someone above him. From Eileen Dobbing's testimony that she took Hull's suggestion to issue a final written warning, I infer that she did not play any significant role in deciding to discipline Giordano. (Tr. 1531–1532.)[35]

The warning concluded that "inappropriate physical and verbal behavior, such as these behaviors exhibited in the workplace, is unacceptable and falls outside the Inova Standards of Behavior" (GC Exh. 26).

In issuing a final written warning to Giordano, Respondent relied on an incident in 2008 in which Giordano raised her voice at Dobbing during a staff meeting.[36] In that staff meeting Giordano and other nurses complained about higher pay being given to new nurses than to nurses that had been at Fairfax Inova for several years.

Respondent Violated the Act in Disciplining Judy Giordano for Engaging in Concerted Protected Activity

When Judy Giordano and other nurses went to Respondent's HR office to show their support for Donna Miller and persuade Respondent to reverse its decision to terminate Miller, they were engaged in activity protected by Section 8(a)(1) of the Act, *Central Valley Meat Co.,* 346 NLRB 1078, 1079 (2006). Judy Giordano's attempt to talk to HR representative Michelle Melito on behalf of Miller was part of this concerted protected activity.

Pursuant to *Atlantic Steel Co.,* 245 NLRB 814, 816–817 (1979), an employer violates the Act by discharging or disciplining an employee engaged in the protected concerted activity unless, in the course of that protest, the employee engages in opprobrious conduct, costing him or her the Act's protection. In assessing the conduct, the Board assesses four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practices.

As noted previously, merely speaking loudly or raising one's voice while engaging in protected concerted activity generally will not deprive an employee of the Act's protection. No different result follows from the fact that Giordano may have touched Melito. The Board has consistently found an employee's conduct to be unprotected when he or she strikes, fights, or even slaps a supervisor. However, even assuming that Giordano touched Melito, she did not exhibit hostility towards Melito or Respondent. The physical contact, if it occurred, was extremely brief and was intended simply to get Melito's attention, see *E. I. Dupont de Nemours*, 263 NLRB 159 (1982).

Applying the Atlantic Steel factors, I place great weight of the fact that the encounter between Giordano, her fellow nurses and Melito was happenstance. Giordano and her colleagues went to HR to show their support for Miller, they did not seek a meeting with Melito, who they happened to see after being told to leave the HR office. Giordano's behavior was not premeditated; it was simply a spontaneous expression of her concern for Miller.

Factor #1, the place of discussion weighs in Giordano's favor. The encounter with Melito occurred in a nonwork area and did not cause any disruption whatsoever.

Factor #2, the subject matter of the discussion, weighs heavily in favor of finding that Giordano did not lose the protection of the Act. The subject of the discussion was the termination of the six nurses' long-time friend and colleague, Donna Miller, who they believed had been unjustly terminated by Respondent. Thus, the nurses' concerted protest of Miller's termination and Giordano's role in the protest was activity protected by Section 7 of the Act.

[35] On the other hand, the final written warning is signed by Dobbing, which seems to belie Respondent's contention that Dobbing could not determine the discipline for Donna Miller because she is technically a contractor rather than an employee of Inova. (GC Exh. 26.) If Dobbing could administer a final written warning, the involvement of higher level management, particularly, CEO Dr. Reuven Pasternak, Dr. Seneca, and Pat Conway-Morana indicates that Respondent decided to terminate Miller after Leanne Gorman talked to Dr. Seneca on February 16.

[36] Dobbing also testified that Giordano pointed her finger and gritted her teeth. (Tr. 1584–1585.) She also testified that afterwards in her office, Giordano sat close to her and put her face close to Dobbing's face. However, Dobbing did not document any of this behavior and I therefore do not credit her testimony on this point. I would also note that if Dobbing "verbally coached" or "verbally reminded" Giordano as she claims, it should have, per Respondent's progressive discipline policy been documented on a form signed by Giordano(GC Exh. 4, B #1367). I credit Giordano's testimony at Tr. 492 that she was never told that she was being verbally warned or being disciplined.

Factor #3, also weighs heavily in favor of finding that Giordano did not lose protection of the Act. If Giordano touched Melito, she did so simply to get her attention, not to hurt her or even to display anger at Melito or Respondent. Giordano's "discussion" was merely a plea for Donna Miller's job. That Respondent knew that Giordano did not touch Melito in an aggressive or hostile manner is established by the draft of its disciplinary notice (GC Exh. 27).

As to factor #4, I find that Giordano's "outburst" was clearly a response to Respondent's pretextual discharge of Donna Miller. As discussed, herein, I find that Miller's discharge violated the Act.

Finally, I find that Respondent's decision to give Giordano a final written warning, with its attendant threat of termination for any other conduct Respondent found objectionable was motivated by a generalized animus towards concerted activity by the ASC nurses. It was also intended to intimidate them from engaging in any sort of concerted activity in the future.[37]

Failure/Refusal to Promote Cathy Gamble to the Clinical Nurse Leader Position

In February 2009, Respondent announced that it intended to create a clinical nurse leader (CNL) position in the ASC and it encouraged the senior nurse specialists (SNS) in the ASC to apply for this position. Eileen Dobbing told the SNS nurses that the CNLs would get a $1 an hour raise from what an SNS was receiving. Three of the five SNS nurses applied for the position, two, Paula Hay and Marta Porta were promoted to CNL; one, Cathy Gamble, was not.

Hay and Porta's names appear on the February 13, 2009 email that Donna Miller sent to Paige Migliozzi and Paula Graling; Gamble's does not. For this reason, Respondent argues that its failure to promote Gamble to CNL cannot possibly be discriminatory in violation of Section 8(a)(1). It is well established that an employer's failure to take adverse action against all union supporters does not disprove discriminatory motive, otherwise established, for its adverse action against a particular union supporter, *Master Security Services,* 270 NLRB 543, 552 (1984); *Volair Contractors, Inc.*, 341 NLRB 673, 676 fn. 17 (2004). The same principle applies to an employer's failure to take adverse action against all employees exercising Section 7 rights in a non-union context.

Only two other nurses applied for the CNL position, Britta Devolder and Deeb Oweis. Both were hired. Devolder had previously worked at Georgetown University Hospital and Oweis worked at Inova's Alexandria, Virginia hospital. Thus, four of the five applicants for the CNL position were awarded the position.[38] The CNLs were hired for specific service lines in the ASC. Oweis was hired to be a CNL for general surgery and urology, the position that would have been most appropriate for Gamble. Respondent admits that Gamble is a good nurse and was qualified for the CNL position. However, it submits that she did not get the CNL job because Oweis was better qualified. (Tr. 416, 2126, 2185.)

The General Counsel alleges that Gamble was not promoted because she engaged in protected concerted activity. The specific incident at issue occurred on June 2, 2009. In September 2009, Mary Lou Sanata told Gamble that one of the reasons that she did not get the CNL position was that she did not support management. As an example, Sanata cited Gamble's conduct at a staff meeting on June 2, 2009. (Tr. 580–581, 2184, GC Exh. 96 at pp. 12.) At that meeting, Patient Care Director Paula Graling thanked Nurse Guna Perry for volunteering to stay late the night before to assist Dr. Soutter in performing an appendectomy in the ASC. (Tr. 580–581, 714–715.)

The previous evening, a laparoscopic (minimally invasive) appendectomy for an approximately 10 or 11 year-old girl was added to Dr. Alexander Soutter's surgery schedule. It was originally scheduled to be performed in the main operating room. At about 7:40 p.m., 20 minutes before Perry was scheduled to leave work, Dr. Soutter asked Perry to call the main operating room (MOR) to determine whether they were ready for him. The charge nurse in the MOR informed Perry that Dr. Soutter would not be able to perform this appendectomy until much later in the evening. Dr. Soutter asked Perry and the scrub technician if they could stay late so that he could perform the appendectomy in the ASC. Perry agreed. Had Perry not agreed to stay late, the MOR would have had to find staff to assist Dr. Soutter. (Tr. 1419.)

The next day, at a staff meeting, after Paula Graling thanked Perry for volunteering to stay late, Graling and Lou Sanata observed Gamble and Nurse Margaret Donegan talking to Perry. Gamble told Perry that she should not have volunteered to stay late because it would create a precedent and that the main OR would now expect the ASC nurses to stay late to assist in surgeries scheduled for the MOR. Perry later met with Graling and Sanata. Perry was crying and she told Graling and Sanata she did not want working conditions in the ASC to change as the result her decision to stay late the night before. Sanata and Graling became aware of what Gamble and Donegan said to Perry either on June 2 or 3.

Gamble's Statements to Guna Perry Did Not Violate Section 8(g) of the Act

Respondent argues that Gamble's statements to Guna Perry were unprotected because they violated Section 8(g) of the Act, which provides in pertinent part:

> [a] labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention. . . . The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

[37] I would also note that Respondent in giving Giordano a final written warning relied on a prior incident in which Giordano's conduct was activity protected by Sec. 7 of the Act. She complained about wages in concert with other nurses at a staff meeting. By raising her voice in doing so, she would not have lost the protection of the Act, *see cases cited herein*.

[38] A sixth applicant, Sheila George, withdrew her application prior to the August 2009 interviews.

I reject this argument for a multitude of reasons. First of all, Section 8(g) applies to "labor organizations" as that term is defined in Section 2(5) of the Act. It does not apply to individual employees, *Walker Methodist Residence*, 227 NLRB 1630 (1977). Gamble and Donegan are not a labor organization, they are individuals acting in concert, who belong to an organization, NAPS, which is not a "labor organization." Their comments to Perry were spontaneous reactions to the news that Perry had volunteered to work late; they were not directed to make these comments by NAPS. Finally, Gamble and Donegan did not engage in any activity prohibited by Section 8(g). They did not engage in a strike, picket, or engage in a concerted refusal to work.

NAPS is Not a Labor Organization

Under the statutory definition set forth in Section 2(5), the organization at issue is a labor organization if (1) employees participate, (2) the organization exists, at least in part, for the purpose of "dealing with" employers, and (3) these dealings concern "conditions of work" or concern other statutory subjects, such as grievances, labor disputes, wages, rates of pay, or hours of employment.

The Limits of "Dealing With"

The Supreme Court held in *NLRB v. Cabot Carbon Co*., that the term "dealing with" in Section 2(5) is broader than the term "collective bargaining." The term ''bargaining'' connotes a process by which two parties must seek to compromise their differences and arrive at an agreement. By contrast, the concept of ''dealing'' does not require that the two sides seek to compromise their differences. It involves only a bilateral mechanism between two parties. That "bilateral mechanism" ordinarily entails a pattern or practice in which a group of employees, over time, makes proposals to management, management responds to these proposals by acceptance or rejection by word or deed, and compromise is not required. If the evidence establishes such a pattern or practice, or that the group exists for a purpose of following such a pattern or practice, the element of dealing is present. However, if there are only isolated instances in which the group makes ad hoc proposals to management followed by a management response of acceptance or rejection by word or deed, the element of dealing is missing, *E. I. Dupont & Co*., 311 NLRB 893, 894 (1993).

There is no evidence that NAPS "deals with" Respondent.

The General Counsel Made Out its Prima Facie Case of Discrimination

I conclude that Respondent violated Section 8(a)(1) in failing to promote Cathy Gamble to CNL. The General Counsel has made a prima facie case that this decision was made to retaliate against Gamble for her concerted activity regarding Guna Perry on June 2, 2009. Gamble and Margaret Donegan criticized Perry for accepting voluntary overtime and attempted to discourage her from doing so in the future. A refusal to perform voluntary work does not constitute an unprotected partial strike, *St. Barnabas Hospital,* 334 NLRB 1000 (2001). Thus, it follows that is not unprotected conduct for one employee to discourage another from accepting voluntary work, particularly when the first employee has a reasonable belief that acceptance of voluntary work will impact the terms and conditions of other employees.

Respondent, by Mary Lou Sanata, has conceded that Gamble's discussion with Guna Perry on June 2, was a factor in the decision not to promote Gamble to CNL. (Tr. 580–581.) I find that Gamble and Margaret Donegan engaged in concerted protected activity in their discussion with Perry. They believed that Perry's action would encourage Respondent to shift more operations from the Main Operating Room to the ASC and force them to work longer hours. Respondent, by its observation of Gamble and Donegan, knew that they were engaged in protected concerted activity. Respondent's animus towards that activity and the prima facie case for a causal connection between Respondent's animus and its decision not to promote Gamble is established by Sanata's testimony.

Respondent has Failed to Rebut the General Counsel's Prima Facie Case

Once the General Counsel made out his prima facie case that Gamble's protected conduct was a factor in its decision not to promote Gamble, the burden of proof shifted to Respondent to prove that it would not have promoted Gamble to CNL even if she had not engaged in protected activity. Respondent has not met this burden. It has not established that it would not have hired 5 CNLs, rather than four, in the absence of Gamble's protected activity and has not proven that it would have hired Oweis, or the very inexperienced DeVolder, rather than Gamble, if it had decided on a nondiscriminatory basis to hire only four.

Respondent did not decide to hire four CNLs until August or September after it knew that there were only five applicants for the position. There is no evidence as to why it decided to hire four instead of five or some other number of CNLs. (Tr. 342–345, 571.) Furthermore, Respondent has not established that either DeVolder or Oweis was a superior candidate to Gamble.

DeVolder was much less experienced than Gamble. Oweis' résumé shows a 6-year gap in employment between 1983 and 1989 and 11 years in a field unrelated to nursing from 1996 to 2007. Oweis' management experience on which Respondent's witnesses relied was very brief--about 10 months when he was hired as a CNL. Prior to being a management coordinator, Oweis was a charge nurse for approximately 16 months. (GC Exh. 42.)

I also find that Gamble's alleged shortcomings are merely posthoc and pretextual rationalizations on the part of Respondent to cover-up its discriminatory motive. Respondent relies on the fact that Gamble functioned as the scrub nurse on only a few occasions in the year prior to the selection of CNLs. In almost every surgery on which she worked, Gamble functioned as the circulating nurse. Circulating nurse is a much more skilled function than scrub nurse. A circulating nurse must be a RN; the scrub function can be performed by a technician who is not a nurse. Respondent has not shown how the paucity of Gamble's recent experience as a scrub nurse would adversely affect her ability to function as a CNL. For example, the precepting in scrub technique can be performed by a scrub technician rather than a CNL. (Tr. 571.)

Respondent also relies on one occasion that Gamble stayed late and did administrative work rather than work in the operating room. I credit Gamble's testimony that she was unaware that Respondent needed help in the operating rooms that day and find this is a pretextual reason advanced by Respondent to justify not promoting Gamble.[39] Additionally, it had been established that some parts of Respondent's assessment of Gamble are simply false, such as the assertion that she is "prone to gossip." (Tr. 581–582.)

Another reason that I find the reasons advanced by Respondent to be pretextual is the disparate nature of its examination of Gamble's qualifications. Respondent went to great lengths to determine the number of times that Gamble worked as a scrub nurse after January 2009. There is no evidence indicating such scrutiny with regard to Devolder's and/or Oweis' qualifications.

Respondent, by Leanne Gorman, Violated Section 8(a)(1) by Telling Donna Miller not to Discuss her Suspension and the Investigation of her Conduct with Anyone Other than her Husband

Donna Miller testified that on February 17, 2009, HR Manager Leanne Gorman told her that she was not to discuss Respondent's investigation of her or her suspension with anyone other than her husband. (Tr. 1212.) Gorman testified that she did not recall telling that to Miller. (Tr. 1746.) I credit Miller in part because her testimony in this regard is consistent with General Counsel's Exhibit 71. This exhibit is an email from Kenneth Hull to Julie Reitman and Gorman stating that Terry Miller was counseled by Paula Graling at a staff meeting on February 26, 2009, when he informed other employees why his wife was no longer coming to work.

As a general proposition, employees have a Section 7 right to discuss discipline or disciplinary investigations involving fellow employees or their own discipline. However, in determining whether an employer violates Section 8(a)(1) in prohibiting or limiting such discussions, the Board balances the interests of the Respondent's employees in discussing this aspect of their terms and conditions of employment with the Respondent's asserted legitimate and substantial business justifications. *Jeannette Corp. v. NLRB*, 532 F.2d 916 (3d Cir. 1976), Caesar's Palace, 336 NLRB 271, 272 (2001); *Westside Community Mental Health Center*, 327 NLRB 661, 666 (1999).

Respondent has not demonstrated any legitimate justification for prohibiting Miller from discussing her suspension with her coworkers. I find that by doing so, it violated Section 8(a)(1).

CONCLUSIONS OF LAW

1. Respondent violated Section 8(a)(1) of the Act in discharging Donna Miller on March 3, 2009.

2. Respondent violated Section 8(a)(1) in telling Donna Miller that she could not discuss her suspension with other employees.

3. Respondent violated Section 8(a)(1) in disciplining Judy Giordano in late March 2009.

4. Respondent violated Section 8(a)(1) in refusing to promote Cathy Gamble to Clinical Nurse Leader in September 2009.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Donna Miller, it must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[40]

The Respondent having discriminatorily disciplined Judy Giordano, it must rescind this discipline.

The Respondent having discriminatorily failed to promote Cathy Gamble to clinical nurse leader must promote Cathy Gamble to clinical nurse leader retroactive to the date that the first nurses were promoted to this position and must make her whole for any loss of earnings and other benefits from that date until she is promoted, plus interest as described above.

The Respondent shall also be required to remove from its files any and all references to the unlawful discharge of Donna Miller and the unlawful discipline of Judy Giordano, and must notify them in writing that this has been done and that Miller's discharge and Giordano's discipline will not be used against them in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[41]

ORDER

The Respondent, Inova Health System, Inc., Fairfax County, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or disciplining or otherwise discriminating against any its employees for engaging in protected concerted activity.

[39] Respondent has not alleged or established that a CNL is a "supervisor" within the meaning of Sec. 2(11) of the Act. Thus, as a remedy for its violation of Sec. 8(a)(1), must offer Cathy Gamble a CNL position. Even assuming that the CNL positions were "supervisory," Respondent violated the Act in failing to promote Gamble, *Georgia Power Co.,* 341 NLRB 576 (2004).

[40] Respondent must also pay Miller for the time between the day she was placed on administrative leave and March 3, since it was Respondent's practice to pay employees who were placed on administrative leave and then exonerated and recalled, for the workdays missed. (Tr. 1742.) At this point, it is purely speculative as to what, if any, discipline Miller would have received apart from Respondent's discrimination for her protected activities.

[41] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Restricting employees' conversations concerning their wages, hours, and other terms and conditions of employment.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Donna Miler full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Within 14 days from the date of the Board's Order, offer Cathy Gamble the position of clinical nurse leader.

(c) Make Donna Miller and Cathy Gamble whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Donna Miller and the unlawful discipline of Judy Giordano, and within 3 days thereafter notify these employees in writing that this has been done and that Donna Miller's discharge and Judy Giordano's discipline will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records, and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Fairfax County, Virginia facility copies of the attached notice marked "Appendix."[42] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 17, 2009.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 18, 2010

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT discharge, discipline, or otherwise discriminate against you for engaging in concerted activity for your mutual aid or protection.

WE WILL NOT prohibit or interfere with your right to discuss your wages, hours, and other terms and conditions of employment with other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, within 14 days of the Board's Order, offer Donna Miller full reinstatement to her former job, or if that job no longer exists, to a substantially equivalent position without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days of the Board's Order, promote Cathy Gamble to clinical nurse leader, retroactive to the first date that any nurse became a clinical nurse leader.

WE WILL make Donna Miller and Cathy Gamble whole for any loss of earnings and other benefits plus interest, resulting from Donna Miller's discharge and our discriminatory refusal to promote Cathy Gamble to Clinical Nurse Leader, less, in Donna Miller's case, any net interim earnings.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the unlawful discharge of Donna Miller and the unlawful discipline of Judy Giordano, and WE WILL within 3 days thereafter, notify them in writing that his has been done and that Donna Miller's discharge and Judy Giordano's discipline will not be used against them in any way.

[42] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."